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No. 09-

IN THE

# Supreme Court of the United States

DAVID P. LEIBOWITZ, TRUSTEE,

*Petitioner,*

*v.*

SYSTEMS DIVISION, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A single bankruptcy case can generate several adversary proceedings, each of which is treated like a separate lawsuit under the larger umbrella of the bankruptcy case. See Fed. R. Bankr. P. 7001. This petition arises from an adversary proceeding in which a bankruptcy trustee sought to enjoin a creditor from extinguishing certain causes of action that the trustee was in the process of prosecuting in a separate adversary proceeding for the benefit of the bankruptcy estate. The trustee contended that the creditor's actions violated the automatic stay, which is one of the fundamental protections provided by the Bankruptcy Code to protect the debtor, its property, and the administration of the debtor's bankruptcy estate. *See* 11 U.S.C. § 362(a).

The questions presented are:

1. Whether an interlocutory appeal in one adversary proceeding divests the bankruptcy court of its jurisdiction to approve the compromise of a related adversary proceeding?

2. Whether a creditor's indirect extinguishment of claims belonging to a bankruptcy estate constitutes an impermissible violation of the automatic stay provisions of 11 U.S.C. § 362(a)(3)?

## PARTIES TO THE PROCEEDING

Petitioner, who was the sole appellant below, is David P. Leibowitz, not individually, but solely in his capacity as the successor chapter 7 trustee for the bankruptcy estate of Teknek, LLC. Respondent, who was the sole appellee below, is Systems Division, Inc. Teknek, LLC appeared before the court of appeals solely in response to an order to show cause.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner David P. Leibowitz is the successor chapter 7 trustee for the bankruptcy estate of Teknek, LLC. Teknek, LLC is an Illinois limited liability company; it has no parent corporation; and no publicly held company has any ownership interest in it.

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## PETITION FOR A WRIT OF CERTIORARI

David P. Leibowitz, not individually, but solely in his capacity as the successor chapter 7 trustee for the bankruptcy estate of Teknek, LLC, respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 563 F.3d 639 (7th Cir. 2009), and it is reproduced in Appendix A. The Seventh Circuit affirmed the December 21, 2007 memorandum opinion and order of the United States District Court for the Northern District of Illinois, which is unofficially reported at 2007 WL 4557813 (N.D. Ill. December 21, 2007) and reproduced in Appendix B. The District Court vacated the June 29, 2007 preliminary injunction order of the United States Bankruptcy Court for the Northern District of Illinois, which is an unreported order reproduced in Appendix C. By separate orders dated August 28, 2007 and October 2, 2007, the Bankruptcy Court extended and clarified the preliminary injunction order. The extension and clarification orders are unreported and reproduced in Appendices D and E, respectively. On March 13, 2009, the Bankruptcy Court also issued a memorandum opinion, which is reported at 402 B.R. 257 (Bankr. N.D. Ill. 2009) and reproduced in Appendix F.

## STATEMENT OF JURISDICTION

The Seventh Circuit entered its judgment on April 29, 2009. On May 28, 2009, the Seventh Circuit denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc*. *See* App. G. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Title 11 United States Code, Section 362(a)(3).**

**§ 362. Automatic stay**

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

## STATEMENT OF THE CASE

Petitioner is the bankruptcy trustee ("Trustee") of Teknek, LLC ("Debtor"), an Illinois company that was in the business of distributing the machinery of its Scottish affiliate ("Affiliate"). The Debtor filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code with the United States Bankruptcy Court for the Northern District of Illinois, and it thereby commenced a bankruptcy case ("Bankruptcy Case").

Prior to the Debtor's bankruptcy filing, respondent Systems Division, Inc. ("SDI") obtained a $3.77 million patent infringement judgment ("Judgment") against the Debtor and the Affiliate in the United States District Court for the Central District of California. At SDI's urging after the Debtor's bankruptcy filing, the Trustee commenced an adversary proceeding in the Bankruptcy Court ("Insider Adversary") against certain insiders of the Debtor (the "Alter Egos") for claims arising from their looting of the Debtor's assets. Among other claims, the Trustee sought to pierce the Debtor's corporate veil to hold the Alter Egos liable for all of the Debtor's obligations, including its obligations under the Judgment.

Unbeknownst to the Trustee, however, SDI was simultaneously pursuing the Alter Egos on similar theories of relief. SDI successfully moved the California District Court to add the Alter Egos to the Judgment on the theory that they fraudulently transferred assets from the Debtor and the Affiliate. Moreover, and notwithstanding the commencement of the Debtor's

bankruptcy case and the Trustee's initiation of the Insider Adversary, SDI thereafter sought to collect the Judgment directly from the Alter Egos.

The Trustee learned of SDI's collection activities when the Alter Egos unsuccessfully sought a stay of the Insider Adversary in order to pay the Judgment directly to SDI. The Trustee believed that SDI's collection activities threatened to impair his ability to prosecute claims against the Alter Egos for the benefit of the bankruptcy estate, which by that time had accrued substantial administrative expenses as a result of the Trustee's pursuit of the Insider Adversary at SDI's urging.

Therefore, in order to protect the estate and preserve the integrity of the ongoing bankruptcy process, the Trustee filed a separate adversary proceeding ("SDI Adversary") against SDI in the Bankruptcy Court. Through the SDI Adversary, the Trustee sought the entry of an order (i) enforcing the automatic stay in the Bankruptcy Case on the basis that SDI's pursuit of the Alter Egos' liability on the Judgment impaired the Trustee's administration of the bankruptcy estate's claims against the Alter Egos, and (ii) preliminarily enjoining SDI from pursuing the Alter Egos pending final resolution of the bankruptcy estate's claims against the Alter Egos.

Upon the filing of the SDI Adversary, the Trustee immediately filed a preliminary injunction motion to enjoin SDI from collecting the Judgment against the Alter Egos pending the Trustee's prosecution of the Insider Adversary. The Bankruptcy Court granted the

Trustee's motion, and it entered a corresponding preliminary injunction order in the SDI Adversary. *See* App. C-E. Upon SDI's subsequent interlocutory appeal, however, the District Court vacated the preliminary injunction order. *See* App. B. The District Court held that the Bankruptcy Court lacked appropriate jurisdiction to enter the preliminary injunction.

The Trustee timely appealed the District Court's vacation of the preliminary injunction order to the Seventh Circuit. Shortly thereafter, SDI settled the Judgment with the Alter Egos. The Trustee nevertheless continued with his appeal because its twin purposes (the preservation of bankruptcy estate property and the vindication of the automatic stay) remained the same. Its focus had merely shifted from the preservation of the bankruptcy estate's claims against the Alter Egos to the preservation of the Judgment proceeds, which the Trustee argued had been misappropriated by SDI in violation of the automatic stay.

During his appeal to the Seventh Circuit, the Trustee also continued to prosecute the Insider Adversary against the Alter Egos. Although SDI's collection of the Judgment had eliminated the Trustee's ability to collect on that same liability from the Alter Egos, valuable claims remained at issue in the Insider Adversary. The Trustee's prosecution of the Insider Adversary eventually generated a settlement, which the Trustee submitted for Bankruptcy Court approval in the Bankruptcy Case. The Trustee's settlement concerned only the bankruptcy estate's claims against the Alter Egos; it did not concern any of the estate's

claims against SDI, which still remained pending in the SDI Adversary. The Bankruptcy Court subsequently issued a memorandum opinion approving the settlement. *See* App. F.

Approximately six weeks after the Bankruptcy Court approved the Trustee's settlement with the Alter Egos, the Seventh Circuit entered its opinion in the appeal below. *See* App. A. The Seventh Circuit recognized that the Alter Egos were liable to both SDI and the Trustee for the Judgment, "but only one of them can receive satisfaction, because the patent judgment can only be recovered once." *See* App. A at 11a. Nevertheless, the Seventh Circuit affirmed the District Court's "holding that SDI's claim is not property of the Teknek estate or related to the bankruptcy proceeding," and it affirmed the District Court's vacation of the preliminary injunction order in the SDI Adversary. *See* App. A at 26a.

The Seventh Circuit also nullified the Bankruptcy Court's approval of the Trustee's settlement of the Insider Adversary. *See* App. A at 24a-26a. The Seventh Circuit stated that, "while the trustee's settlement does not directly and specifically address the issues immediately before us, it purports to deal with matters that are integral to this appeal." *See* App. A at 24a. It also sanctioned the Trustee for entering into a "rogue bankruptcy settlement" in derogation of the Seventh Circuit's jurisdiction over the interlocutory appeal from the preliminary injunction order in the SDI Adversary. *See* App. A at 26a.

## REASONS FOR GRANTING THE PETITION

The question of whether an interlocutory appeal in one adversary proceeding divests the bankruptcy court of its jurisdiction to approve the compromise of a related adversary proceeding merits a writ of certiorari to the Seventh Circuit. By holding that an interlocutory appeal divested a trial court of its jurisdiction to proceed with related issues in the underlying case, the Seventh Circuit's decision directly conflicts with all of the other Circuits on an important matter of federal appellate jurisdiction. By holding that *any* appeal in a bankruptcy adversary proceeding divested a bankruptcy court of jurisdiction to proceed with a compromise of a related but separate adversary proceeding, the Seventh Circuit's decision conflicts with previous decisions of this Court on the scope of federal appellate jurisdiction. It also adds another layer of confusion to the muddy inconsistency that exists among the lower courts regarding the jurisdictional effects of a notice of appeal in a discrete bankruptcy matter.

The Seventh Circuit's decision threatens to hamper the administration of bankruptcy cases while appeals on discrete matters wind their way through one or more levels of appellate review. In the absence of guidance from this Court on where the jurisdictional boundaries are marked after an appeal is filed in a discrete bankruptcy matter, the efficient administration of bankruptcy cases will suffer. Bankruptcy courts will be uncertain about their remaining jurisdiction; bankruptcy trustees will delay the administration of bankruptcy cases out of a fear of sanctions if they tread too closely to the higher court's appellate jurisdiction

(as occurred in the case below); and creditors will lose recoveries as the value of their beneficial interest in bankruptcy estates erodes from the corresponding uncertainty and delay of appeals.

This Court's review of the Seventh Circuit's decision is also required to settle the important issue of whether an indirect extinguishment of claims belonging to a bankruptcy estate constitutes an impermissible violation of the automatic stay provisions of 11 U.S.C. § 362(a)(3). The automatic stay is one of the fundamental protections that Congress imbued into the Bankruptcy Code to protect property of a bankruptcy estate. By sanctioning a creditor's collection activities in spite of its recognition that those activities also extinguished causes of action belonging to the bankruptcy estate, the Seventh Circuit has materially diluted the potency of the automatic stay in bankruptcy. Its holding on the issue also departs substantially from those of other courts of appeals that have addressed the issue of indirect violations of the automatic stay. A writ of certiorari should issue accordingly.

## I. Review Is Warranted To Resolve A Circuit Conflict Over The Effect Of An Interlocutory Appeal Upon A Federal Trial Court's Remaining Jurisdiction.

Before the Seventh Circuit's decision below, all of the Circuits that had ruled directly on the issue of a trial court's jurisdiction after an interlocutory appeal of a preliminary injunction had followed the general rule that the appeal "does not defeat the power of the trial court to proceed further with the case." *Pharmaceutical*

*Care Mgmt. Ass'n v. Maine Attorney General*, 332 F.Supp.2d 258, 259 (D. Me. 2004) (quoting 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE ("WRIGHT") § 3921.2 at 53 (3d ed. 1999)) (citing *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996); *Ry. Labor Executives' Ass'n v. Galveston*, 898 F.3d 481, 481 (5th Cir. 1990); *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986); *United States v. Price*, 688 F.2d 204, 215 (3d Cir. 1982); *Soc'y for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 918 (D.C. Cir. 1975); *United States v. Lynd*, 321 F.2d 26, 28 (5th Cir. 1963), *cert. denied* 375 U.S. 968 (1964)). *See also G&M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973) ("[A]n appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits – i.e, the merits are not matters 'involved in the appeal.'"). *Cf. Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906) ("The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.").

In stark contrast, the Seventh Circuit's decision below held that an appeal from a preliminary injunction order divested the bankruptcy court from taking certain actions on separate matters in the underlying bankruptcy case. *See* App. A at 22a-26a. The Seventh Circuit's holding created a split from all of the other Circuits noted above. All of those other Circuits firmly concluded that an interlocutory appeal from a preliminary injunction did not divest the applicable trial courts of jurisdiction to proceed on the merits in their underlying cases.

If left undisturbed, the Seventh Circuit's decision will have a detrimental effect on the administration of federal cases pending the interlocutory appeal of a preliminary injunction order. As one commentator has noted:

> Interlocutory injunction appeals would come at high cost if the trial court were required to suspend proceedings pending disposition of the appeal. The delay and disruption alone would be costly. More important, cases involving injunctive relief are apt to present an urgent need for action. An injunction can seriously disrupt the affairs of those bound by it. Denial of an injunction can destroy the capacity to grant effective relief after trial. Continuing trial court proceedings, moreover, often pose little threat to orderly disposition of the appeal; ordinarily the scope of the appeal will be limited to consideration of the preliminary injunction decision itself, despite the power to reach out to other matters.

WRIGHT at § 3921.2. Consequently, this Court's review of the Seventh Circuit's decision is warranted.

## II. Review Is Warranted To Resolve The Effect Of An Appeal Upon A Bankruptcy Court's Jurisdiction Over Remaining Matters In The Underlying Bankruptcy Case.

### A. The Seventh Circuit's Decision Conflicts With This Court's Decisions On Appellate Jurisdiction In *Griggs* And *Marrese*.

The Seventh Circuit's decision also conflicts with relevant decisions of this Court on the scope of appellate jurisdiction. This Court has previously stated the jurisdictional significance of a notice of appeal – it confers jurisdiction upon an appellate court and divests the trial court of its control "over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (*per curiam*). However, this Court has also stated that this proposition does not imply that an immediate appeal on a discrete matter in a case divests any other part of the case from the trial court. *See Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (immediately appealable contempt judgment based on noncompliance with a discovery order was the only matter before appellate court and did not transfer jurisdiction over the underlying case).

In its decision below, the Seventh Circuit erroneously expanded the rule of appellate jurisdiction that this Court articulated in *Griggs* and circumscribed in *Marrese*. The Seventh Circuit stated, "when a case is on appeal, all lower courts lose jurisdiction over it *and related matters*." *See* App. A at 22a (emphasis added). Though the Seventh Circuit cited *Griggs* in support of

that statement, its annexation of "related matters" onto the *Griggs* rule unduly expanded the rule's scope beyond the particular matter on appeal. *See* App. A at 24a ("To be clear, while the trustee's settlement does not directly and specifically address the issues immediately before us, it purports to deal with matters that are integral to this appeal."). That undue expansion conflicts with this Court's circumscription of *Griggs* in its subsequent *Marrese* decision.

The Seventh Circuit's expansion of appellate jurisdiction over bankruptcy matters has broad ranging implications beyond the case below. Bankruptcy cases often generate immediately appealable orders like the contempt judgment at issue in *Marrese*. As the Seventh Circuit itself previously noted:

> A bankruptcy proceeding . . . is often a conglomeration of separate adversary proceedings that, but for the status of the bankrupt party which enables them to be consolidated in one proceeding, would be separate, stand-alone lawsuits. Parties to these separate proceedings should not have to wait for the end of the entire bankruptcy proceeding before they can appeal, and therefore finality in bankruptcy has been interpreted to embrace the final decision in any adversary proceeding that, but for its bankruptcy setting, would be a separate suit.

*See In re James Wilson Assoc.*, 965 F.2d 160, 166 (7th Cir. 1992). Therefore, like the separately appealable contempt judgment in *Marrese*, a discrete bankruptcy

matter on appeal should be the only matter that appears before an appellate court; all other matters should remain with the bankruptcy court. To eliminate any inconsistency over the appropriate scope of appellate jurisdiction from bankruptcy appeals, this Court should review the Seventh Circuit's contrary decision and its annexation of "related matters" to its appellate jurisdiction over the discrete bankruptcy order on appeal.

### B. The Lower Courts Have Applied Inconsistent Rules On The Divestiture Of Bankruptcy Court Jurisdiction Upon The Appeal Of A Discrete Matter.

Irrespective of its conflicts with the decisions of this Court or other Circuits, the Seventh Circuit's decision warrants this Court's review to settle the question of whether, and to what extent, an appeal of a discrete bankruptcy matter divests the bankruptcy court from proceeding with related matters in the bankruptcy case. The lower courts disagree about whether an appeal from a discrete bankruptcy matter divests the bankruptcy court from proceeding with related matters in the bankruptcy case. Moreover, those that have found a divestiture of related matters upon appeal, including the Seventh Circuit in its decision below, have been inconsistent in adopting an appropriate standard of relatedness. This Court's guidance is required to settle the issue.

Prior to the Seventh Circuit's decision below, the Fifth Circuit was the only court of appeals to have directly addressed the issue of whether the appeal of a

discrete bankruptcy matter divested the bankruptcy court from dealing with related matters. *See Sullivan Cent. Plaza I, Ltd. v. BancBoston Real Estate Capital Corp. (In re Sullivan Cent. Plaza I, Ltd.)*, 935 F.2d 723, 727 (5th Cir. 1991). *Cf. In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690-91 (7th Cir. 1991) (holding that appeal from bankruptcy court's settlement order did not divest its jurisdiction to enter a related sale order but not directly addressing relatedness issue).

In *Sullivan*, the Fifth Circuit flatly declined to "adopt the broad rule that a bankruptcy court may not consider any request which either directly or indirectly touches upon the issues involved in a pending appeal and may not do anything which has any impact on the order on appeal." *See Sullivan*, 935 F.2d at 727 (5th Cir. 1991) (rejecting *In re Kendrick Equip. Corp.*, 60 B.R. 356, 358 (Bankr. W.D. Va. 1986); *In re Urban Dev. Ltd.*, 42 B.R. 741 (Bankr. M.D. Fla. 1984)). As the Fifth Circuit explained, such a rule "would severely hamper the bankruptcy court's ability to administer its cases in a timely manner. Parties could tie up proceedings for long periods of time while their various appeals wound their way through three levels of appellate review." *Sullivan*. 935 F.2d at 727. *See also In re Strawberry Square Assocs.*, 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993) (Depriving the bankruptcy court of jurisdiction over other aspects of the case "would freeze the case at the procedural posture reached when the appeal was filed, and would inure unjustly to the benefit of any party whose interests were furthered by delay.").

In contrast to the Fifth Circuit, some lower courts have adopted variations of a broad rule that an appeal

from a bankruptcy order divests the bankruptcy court of the matter on appeal and all related matters as well. *See, e.g., Whispering Pines Estates, Inc. v. Flash Island, Inc.*, 369 B.R. 752, 761 (B.A.P. 1st Cir. 2007) (Subject matter of bankruptcy appeal "is not limited to the issues specifically defined in the appeal, but includes all of those matters that can directly affect the outcome of the appeal."); *In re Southold Dev. Corp.*, 129 B.R. 18, 21 (E.D.N.Y. 1991) ("In sum, the bankruptcy court in the case at bar was divested of jurisdiction regarding issues on appeal, as well as matters undeniably related to issues on appeal, upon the filing of the notice of appeal.") (citing *Griggs*); *Urban Dev.*, 42 B.R. at 744 ("[T]his court should not interfere with the appeal process and entertain any request [sic] the Debtor which either directly or indirectly touches upon the issues involved in the pending appeal.").

However, even these courts, which the Seventh Circuit has now joined through its decision below (*see* App. A at 23a (citing *Whispering Pines*)), have struggled in their attempts to identify an objective "relatedness" standard that will permit bankruptcy courts to see clear jurisdictional lines after an appeal. *See Whispering Pines*, 369 B.R. at 758 ("Determining what is related and unrelated to the pending appeal in a bankruptcy case, however, is not always a simple task."). Their "relatedness" standards range from a more restrictive standard of matters that "directly affect the outcome of the appeal" (*Whispering Pines*) to the much broader standard of matters that "either directly or indirectly touch" upon the appeal (*Southold*). *See Whispering Pines*, 369 B.R. at 761; *Southold*, 129 B.R. at 21. *Cf. Strawberry Square*, 152 B.R. at 702 (possible

mooting of appeal "is not controlling" to divestiture issue). Now, through its decision below, the Seventh Circuit has added to the mix of standards, finding relatedness because, "while the trustee's settlement does not directly and specifically address the issues immediately before us, it purports to deal with matters that are integral to this appeal." *See* App. A at 24a.

This Court's guidance is required to settle the uncertainty that currently exists over a bankruptcy court's remaining jurisdiction pending an appeal from a discrete matter. Most sizable commercial bankruptcies generate immediate appeals from discrete contested matters. Vague jurisdictional boundaries over remaining, related matters will cause uncertainty and delay in the administration of bankruptcy cases. That uncertainty and delay will detrimentally affect the administration of bankruptcy cases, which require the swift resolution of disputes in order to preserve asset values and conserve administrative expense. In order to avoid bankruptcy cases from grinding to an unnecessary standstill due to doubt and confusion about the applicable standard controlling the divestiture of bankruptcy court jurisdiction after an appeal, this Court's guidance is necessary. A writ of certiorari to the Seventh Circuit should issue accordingly.

## III. Review Is Warranted To Settle The Important Question Of Whether An Indirect Extinguishment Of Bankruptcy Estate Property Violates The Automatic Stay Provisions Of 11 U.S.C. § 362(a)(3).

This Court's review of the Seventh Circuit's decision is also necessary to settle the important issue of whether an indirect extinguishment of property belonging to a bankruptcy estate constitutes an impermissible violation of the automatic stay provisions of 11 U.S.C. § 362(a)(3). Section 362(a)(3) proscribes "any act to obtain possession of property of the estate" or "to exercise control over property of the estate." *See* 11 U.S.C. § 362(a)(3). By sanctioning a creditor's collection actions notwithstanding their corresponding extinguishment of a bankruptcy estate's causes of action, the Seventh Circuit has departed from every other court of appeals that has addressed the issue of automatic stay violations based upon indirect acts against property of a bankruptcy estate. To ensure that the fundamental protection of the automatic stay retains its potency in bankruptcy cases, this Court's review is warranted.

The Second, Sixth, and Ninth Circuits have all recognized that an indirect threat to property of a bankruptcy estate constitutes a violation of the automatic stay under § 362(a)(3).[1] *See Amedisys, Inc.*

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[1] Prior to its issuance of the decision below, the Seventh Circuit also recognized indirect threats to estate property as § 362(a)(3) stay violations. *See Underwood v. Hilliard (In re*

(Cont'd)

*v. Nat'l Century Fin. Enters., Inc.*, 423 F.3d 567, 578 (6th Cir. 2005) (action against a nondebtor may be subject to the stay under § 362(a)(3) if the action would have an adverse impact on property of the debtor's estate); *In re Prudential Lines, Inc.*, 928 F.2d 565, 573-75 (2d Cir. 1991) (parent corporation's attempt to take a worthless stock deduction impaired its debtor-subsidiary's net operating loss deduction and therefore violated § 362(a)(3)); *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 430-31 (2d Cir. 1987) (landlord's service of lease termination notice on debtor's parent corporation violated § 362(a)(3) because it impaired debtor's sublease); *In re Bialac*, 712 F.2d 426, 431-32 (9th Cir. 1983) (lienholder's foreclosure on nondebtors' interest in note violated § 362(a)(3)).

The Sixth Circuit summarized the common holding:

> As a sister circuit has held, "[A]n action taken against a nondebtor which would inevitably have an adverse impact upon the property of the estate must be barred by the [§ 362a)(3)] automatic stay provision." *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 392 (2d Cir. 1997) (citing *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987)).

(Cont'd)
*Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996) (recourse to a nonbankruptcy court posed an indirect threat to the estate and constituted an automatic stay violation). *See also In re Kuehn*, 563 F.3d 289 (7th Cir. 2009) (university's refusal to provide a transcript violated the automatic stay).

*Amedisys*, 423 F.3d 567 at 578. *See also Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993) (relevant inquiry under § 362(a)(3) concerns the impact of the action on property of the estate as opposed to the identity of the defendant and the existence of "unusual circumstances" required to make the stay under § 362(a)(1) applicable to nondebtors).

All of these courts of appeals came to the same conclusion: indirect action that has an adverse impact on property of the estate is a violation of the automatic stay under § 362(a)(3). In short, what cannot be accomplished directly against property of the estate cannot be accomplished indirectly either. By contrast, the Seventh Circuit held below that a creditor could take action against a common litigation target of the bankruptcy estate even though its action would extinguish the estate's claims against the target. *See* App. A at 11a ("[B]oth SDI and the trustee have a claim against the alter egos, but only one of them can receive satisfaction, because the patent judgment can only be recovered once.").

This Court's review of the Seventh Circuit's decision is appropriate in order to defend the automatic stay provisions of 11 U.S.C. § 362(a)(3) from indirect violations. As the First Circuit has previously noted, "'[t]he dead tree gives no shelter.' . . . Like a shade tree, the automatic stay must be nurtured if it is to retain its vitality." *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 971 (1st Cir. 1997) (quoting T.S. Eliot, *The Burial of the Dead* (1922). If left undisturbed, the Seventh Circuit's decision to permit a creditor's indirect

extinguishment of estate property will mark a dangerous dilution of the automatic stay, and future bankruptcy estates will suffer from the stay's inefficacy.

## CONCLUSION

For the foregoing reasons, a writ of certiorari from this Court to the Seventh Circuit should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 29, 2009**

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

No. 08-1137

In re TEKNEK, LLC,

*Debtor*,

PHILLIP D. LEVEY, TRUSTEE,

*Plaintiff-Appellant*,

v.

SYSTEMS DIVISION, INC.,

*Defendant-Appellee*.

Argued Sept. 23, 2008

Decided April 29, 2009

Before BAUER, CUDAHY and WILLIAMS, Circuit Judges.

CUDAHY, Circuit Judge.

Systems Division, Inc. (SDI) obtained a judgment for patent infringement against Teknek LLC (Teknek) and Teknek Electronics (Electronics) in a district court

in California. While the patent suit was pending, Teknek and Electronics' sole shareholders, Jonathan Kennett and Sheila Hamilton, created Teknek Holdings (Holdings) and proceeded to funnel both companies' assets into Holdings, leaving Teknek and Electronics insolvent. From here, matters get complicated. After SDI won its patent suit, it successfully moved the federal district court in California to add Kennett, Hamilton and Holdings to the judgment as defendants on an alter ego theory. Meanwhile, Teknek (but not Electronics) filed for bankruptcy in the Northern District of Illinois, and the bankruptcy trustee brought an adversary proceeding against Hamilton, Kennett and other successor entities of Teknek (but not Electronics or Holdings) alleging, among other things, that Hamilton and Kennett were Teknek's alter egos and seeking to recover the SDI judgment on behalf of the estate. The question presented by this appeal is whether SDI's collection action against Kennett, Hamilton and Holdings (the alter egos) may be enjoined so that the trustee can pursue its claim for the same judgment against Kennett and Hamilton. The bankruptcy court held that SDI's claims against the alter egos were "property of the estate" under § 541 of the Bankruptcy Code, 11 U.S.C. § 541, and therefore that the trustee had an exclusive right to bring those claims. The bankruptcy court accordingly enjoined SDI from collecting its patent judgment outside of bankruptcy. On appeal, the district court found that SDI's alter ego claims were neither property of the estate nor related to the bankruptcy proceeding. It therefore ruled that SDI's claims were not subject to the automatic stay

under § 362, nor to an injunction under § 105 of the Bankruptcy Code. We agree with the district court and therefore hold that it properly vacated the bankruptcy court's injunction.

## I.

SDI makes "clean machines," which remove small particles from flat materials such as film, lamination and electronic circuitry. Teknek and Electronics were SDI's competitors. More precisely, Teknek was a U.S. distributor of clean machines made by Electronics, Teknek's Scottish affiliate. Teknek and Electronics were separate entities, both controlled by Hamilton and Kennett, Scottish citizens. Kennett owned 85 percent of the shares in both companies, and Hamilton owned the other 15 percent. In February 2000, SDI filed its patent infringement suit against Teknek and Electronics. A few months later, Kennett and Hamilton created Holdings. Between 2003 and 2004, Electronics transferred £ 5 million to Holdings, as well as manufacturing equipment and a building. Electronics received no consideration for these asset transfers. In contrast to Electronics' relatively large asset holdings, Teknek's assets were limited to some office furniture, computers, a car and Teknek's receivables. These assets ultimately were transferred to Holdings as well. Much was made at argument and by both the California federal district court and the federal district court in Chicago (which acquired jurisdiction through the bankruptcy filing) about whether Teknek's assets were transferred directly to Holdings or first to Electronics. Because this

issue is not material to the outcome, we do not revisit it here.

Following a jury trial on its patent claims, SDI won a judgment of $3.77 million against Teknek and Electronics in August 2004. The defendants' liability on the judgment was joint and several. But by this point, Teknek and Electronics were judgment proof, so SDI moved the California federal court to add Kennett, Hamilton and Holdings as defendants based on an alter ego theory. The California court granted SDI's motion, finding that Kennett and Hamilton were alter egos of both Teknek and Electronics under California law, because they had transferred assets from Teknek and Electronics to Holdings with intent to defraud SDI. The California federal court's holding meant that the alter egos were directly liable for the patent judgment. The court also found that Holdings was a mere continuation of Electronics and therefore liable for Electronics' debt to SDI as a successor corporation. The alter ego finding was later affirmed by the Federal Circuit. Meanwhile Teknek filed its Chapter 7 petition in the bankruptcy court for the Northern District of Illinois. SDI appeared in the Illinois bankruptcy proceeding and filed a notice of its claim. Teknek's bankruptcy trustee filed an adversary proceeding in the bankruptcy case, asserting claims for, inter alia, fraudulent transfers and breach of fiduciary duty against Kennett and Hamilton. The trustee's complaint also seeks to hold Kennett and Hamilton personally liable for Teknek's obligation on the judgment to SDI based on an alter ego theory. This claim is identical to SDI's claim, except that Holdings is

not a defendant in the trustee's complaint and the trustee seeks to reach the alter egos through Teknek only, rather than through Electronics or by virtue of the California federal court's order that the alter egos, too, are judgment debtors on the patent claims.

SDI and the alter egos came close to reaching a settlement outside the bankruptcy proceeding in the spring of 2007. In May of that year, Kennett and Hamilton filed a motion to stay the trustee's adversary proceeding in the bankruptcy court so that they could complete their settlement with SDI. The bankruptcy court denied the motion. Then in June, the bankruptcy judge entered the preliminary injunction that is the subject of this appeal.

The bankruptcy court's injunction order does not carefully distinguish between Teknek and Electronics. Although it acknowledges that SDI's patent suit was against both Teknek and Electronics, and that SDI sought to add Hamilton, Kennett and Holdings as defendants on an alter ego theory, the bankruptcy court states that the judgment in the patent suit is only against "the Debtor." The bankruptcy court's order omits any mention at all of Electronics' joint and several liability on the patent judgment. Also omitted is the California district court's alter ego ruling that Kennett, Hamilton and Holdings are equally on the hook for the liability of *Electronics* as they are for the liability of the *debtor*. The order indicates that the *debtor* is the only entity directly liable for the patent judgment. If this were the case, SDI would have been properly enjoined

from pursuing its claim, as it would have been a claim against the debtor reserved for the bankruptcy trustee. But this is not the case. Nevertheless, neither Electronics nor the alter egos are mentioned as being directly liable. The bankruptcy court's injunction order concludes misleadingly that "the [California] District Court's determination that Hamilton, Kennett and Holdings could be properly added as defendants to the SDI Judgment and pursued for collection of the same was based on SDI's claims that (a) Hamilton and Kennett were the alter egos *of the Debtor*; (b) that Hamilton and Kennett caused the transfer *of the Debtor's* assets with the actual intent to defraud SDI; (c) that the assets were transferred for no consideration; and (d) that such transfers were intended to result *in the Debtor's* insolvency."

Because of the bankruptcy court's injunction, a settlement conference scheduled for July 2007 between SDI and the alter egos in California was canceled. In August, the trustee filed his own settlement motion in the Illinois bankruptcy court. In October the bankruptcy court entered an order finding that SDI's proceedings in California were adversely affecting the trustee's attempts to settle the case. Then the California federal court issued a sanctions order purporting to nullify the bankruptcy court's preliminary injunction and to enjoin the debtor, Electronics and the alter egos from transferring any assets. SDI appealed the bankruptcy court's preliminary injunction order to the district court for the Northern District of Illinois.

The district court in Chicago vacated the preliminary injunction, finding that the bankruptcy court lacked jurisdiction to enjoin SDI's settlement with the alter egos. The district court concluded that the automatic stay, 11 U.S.C. § 362, did not extend to SDI's claim. The court reasoned that SDI's claim was personal to it and independent of any claim a hypothetical general creditor could have brought against Teknek. Therefore the claim was not property of the estate, and not covered by the automatic stay. "SDI seeks to collect its patent infringement judgment directly from Electronics, Holdings, Kennett, and Hamilton. . . . Electronics, Holdings, Kennett, and Hamilton are directly liable to SDI for the patent infringement judgment, and neither Teknek nor any claimant or creditor has any interest in that judgment. Thus, SDI's claims are personal and do not belong to the estate." *In re Teknek, LLC*, No. 07 C 5229, 2007 WL 4557813, at *7 (N.D.Ill.Dec.21, 2007).

The district court in Chicago then acknowledged that, even if not property of the estate, SDI's claim may be within the bankruptcy court's "related-to" jurisdiction under 28 U.S.C. § 1334(b). The court concluded however that SDI's claim was not "related to" the bankruptcy case, because the "harm" SDI suffered was patent infringement—a harm no other creditor could claim—and because allowing SDI to collect from the non-debtors on the patent judgment would not prevent the trustee from also pursuing fraudulent transfer claims on behalf of the debtor's estate. 2007 WL 4557813, at *8, *10. Because the district court in Chicago agreed with the California federal

court's finding that Teknek had transferred all of its assets directly to Holdings, instead of to Electronics, the court also concluded that there was no need for the bankruptcy court to untangle Teknek's assets from Electronics' assets, obviating that basis for related-to jurisdiction. The court also focused on the fact that SDI was Teknek's only major creditor: allowing SDI to settle its claim outside bankruptcy would not impair the recovery of a larger class of creditors, so the primary function of the trustee—to maximize recovery on behalf of creditors as a whole—was not implicated. *Id.* at *8.

Further, the district court found there was no indication the alter egos would not be able to satisfy both SDI's claim and any fraudulent transfer claims the trustee brought on behalf of the estate. *Id.* at *12. As a practical matter, then, the court found that allowing SDI to control the settlement would not derail the bankruptcy proceedings. We agree with most of these conclusions, though, as will appear, the fact that the underlying harm suffered by SDI was patent infringement does not, by itself, make it a claim no other creditor could assert. By such logic, all creditors' claims would be personal to the specific creditor: a supplier's claim for payment on supplies would be deemed personal because no other creditor could claim payment for the same supplies; an employee's claim for his back pay would be personal to the extent that no other employee could claim back pay for that employee's hours worked. If all such claims were "personal," no creditor would have to wait in line behind the bankruptcy trustee to assert her claims. With such segregation of claims, the

bankruptcy system would collapse. What is significant about SDI's patent infringement claim is not that it is for patent infringement; instead significance lies in SDI's reduction of the claim to judgment against both the debtor *and an independent non-debtor*, Electronics. It is Electronics' joint and several liability that makes SDI's claim special. Because of Electronics' independent liability on the judgment, we also do not find it significant whether Teknek transferred assets first to Electronics and then to Holdings or directly to Holdings—either way, Electronics' independent liability remains. For the same reasons, we do not put much weight on the fact that SDI is the sole creditor in the bankruptcy case.

The Illinois federal district court also found that "the equities counsel against the bankruptcy court's exercise of jurisdiction." *Id.* at *13. This seems to be a species of abstention rather than further support for the court's holding regarding the absence of related-to jurisdiction. In this respect, the district court relied on *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65-66 (2d Cir.1986), for its conclusion that wrongdoers cannot take advantage of the bankruptcy jurisdiction to avoid paying a judgment against them. The court found that Kennett, Hamilton and Holdings had used "complicated machinations to avoid paying a judgment." *In re Teknek*, 2007 WL 4557813, at *13. "Bankruptcy procedures cannot be used to achieve this end, and the bankruptcy court thus lacked jurisdiction." *Id.* Yet *Teachers* did not explicitly address the bankruptcy court's related-to jurisdiction. Its decision was based on the bankruptcy

court's "general equity powers under 11 U.S.C. § 105." 803 F.2d at 65. *Teachers* also preceded this court's decision in *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir.1998), which plainly finds that bankruptcy jurisdiction may exist even where it enjoins a creditor from collecting from non-bankrupt co-defendants who have acted in bad faith. *See Fisher*, 155 F.3d at 880.

Following the Illinois district court's decision, the alter egos paid SDI in full satisfaction of the judgment against them. The trustee's appeal of the district court's order vacating the bankruptcy court's preliminary injunction is now before us.

## II.

There is no dispute that if SDI were trying to collect its patent judgment from Teknek, the debtor, it would be barred by the terms of the § 362 automatic stay. But SDI also has a judgment on the same claim against Electronics. Electronics' liability is joint and several with that of the debtor and, importantly, Electronics is directly liable to SDI. A further wrinkle, however, is that Electronics, like Teknek, is insolvent. SDI addressed this problem by seeking to have Kennett, Hamilton and Holdings added to the patent judgment as additional judgment debtors. The California federal court obliged, holding that Kennett, Hamilton and Holdings were also jointly and severally—and directly—liable for the entire patent judgment, because they were the alter egos of both Teknek and Electronics. SDI's "claim" is therefore in the nature of a collection action—this "claim" has

already been reduced to judgment against not merely the debtor, but also the four non-debtors, Electronics, Kennett, Hamilton and Holdings. SDI argues that it can reach the alter egos directly because of this judgment, and, in any event, that it can reach the alter egos via Electronics on a veil-piercing theory. At the same time, the trustee argues that it can reach the alter egos via Teknek and collect on SDI's judgment on behalf of the estate because that judgment is a debt the alter egos also owe to the debtor. This is because, in addition to looting Electronics, the alter egos also looted the debtor. The alter egos are therefore liable to the debtor for the SDI judgment because of their responsibility for the debtor's inability to repay it. In essence, then, both SDI and the trustee have a claim against the alter egos, but only one of them can receive satisfaction, because the patent judgment can only be recovered once.

To determine what entity may exercise this right of satisfaction against the alter egos, it is necessary to consider the kinds of claims that may be brought only by the trustee in bankruptcy. The purpose and duty of the trustee is to gather the estate's assets for pro rata distribution to the estate's creditors. *See Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1352 (7th Cir.1987). In aid of that duty, and as discussed in detail below, the trustee has the sole right and responsibility to bring claims on behalf of the estate and on behalf of creditors as a class—so-called "general" claims. But the trustee's right to bring claims on behalf of creditors is not infinite. Individual creditors retain the right to bring "personal" claims that do not implicate

the trustee's purpose. The distinction between "general" and "personal" claims ensures that the trustee will be able to fulfill the purpose of the bankruptcy laws without allowing the bankruptcy jurisdiction to swallow claims only tangentially related to the debtor. *See Fisher*, 155 F.3d at 880 ("The trustee, acting on behalf of the estate or the creditors as a whole, obviously may not roam around collecting whatever property suits her fancy. Her task instead is to recover and manage the 'property of the estate,' . . .").

As for the kinds of claims reserved for the trustee, first, the trustee has the sole responsibility to represent the estate by bringing actions on its behalf. *Fisher*, 155 F.3d at 879 (citing, *inter alia*, 11 U.S.C. § 323). In this respect, the bankruptcy estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. The estate includes any action a debtor corporation may have "to recover damages for fiduciary misconduct, mismanagement or neglect of duty," and the trustee succeeds to the right to bring such actions. *Koch*, 831 F.2d at 1343-44. Second, the trustee has creditor status under 11 U.S.C. § 544 and is the only party that can sue to represent the interests of the creditors as a class. *Koch*, 831 F.2d at 1342-43; *see also Matter of Kaiser*, 791 F.2d 73, 76 (7th Cir.1986). However, the trustee has no standing to bring "personal" claims of creditors, which are defined as those in which the claimant has been harmed and " 'no other claimant or creditor has an interest in the cause.' " *Fisher*, 155 F.3d at 879 (quoting *Koch*, 831 F.2d at 1348).

"[A]llegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim . . .

"A trustee may maintain only a general claim. His right to bring a claim depends on whether the action vests in the trustee as an assignee for the benefit of creditors or, on the other hand, accrues to specific creditors."

*Fisher*, 155 F.3d at 879-80 (quoting *Koch*, 831 F.2d at 1348-49); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir.1989) (holding that RICO claims were personal, and plaintiffs were therefore entitled to sue on their own, because their injuries were distinct from the injuries to creditors in general resulting from the diversion of corporate assets); *see also Steinberg v. Buczynski*, 40 F.3d 890, 891-92 (7th Cir.1994) (holding that the trustee could not bring a claim against sole shareholders of bankrupt corporation where shareholders had not looted or otherwise injured the corporation). "The equally valid mirror-image principle is that a single creditor may not maintain an action on his own behalf against a corporation's fiduciaries if that creditor shares in an injury common to all creditors

> and has personally been injured only in an indirect manner." *Koch*, 831 F.2d at 1349 (citing, *inter alia, Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 861 (10th Cir.1986)); *see also In re MortgageAmerica Corp.*, 714 F.2d 1266, 1277 (5th Cir.1983) (holding that a fraudulent transfer claim against a corporate debtor's control person belongs to the corporate debtor, not to specific creditors); *Dana Molded Prods., Inc. v. Brodner*, 58 B.R. 576, 580-81 (N.D.Ill.1986) (holding that a judgment creditor lacked standing under RICO to bring a personal claim for bankruptcy fraud committed *against the corporation itself* in an attempt to hinder creditors generally).

To determine whether an action accrues individually to a claimant or generally to a corporation, then, we must look to the injury for which relief is sought. We must consider whether that injury is "peculiar and personal to the claimant or general and common to the corporation and creditors." *Koch*, 831 F.2d at 1349. In making this distinction it is helpful to compare the facts of the leading cases. In *Koch*, for instance, we found that a group of oil companies' claims against a debtor's fiduciaries were general claims. The oil companies had regularly exchanged petroleum products with the debtor, Energy Cooperative, Inc. (ECI). 831 F.2d at 1340. ECI, as debtor-in-possession, brought preference actions against the oil companies, and also sued its member-owners, who were regional agricultural

cooperatives that had formed ECI to ensure a steady supply of petroleum products for their agricultural businesses. *Id.* ECI alleged that the member-owners had breached their fiduciary duties by preventing ECI from remedying breaches of contract and by causing ECI to take other actions contrary to its best interests. *Id.* ECI's suit sought to hold the member-owners liable for all of ECI's debts under a "veil-piercing" theory. ECI's Chapter 11 reorganization case was later converted to a Chapter 7 liquidation, and a trustee was appointed who continued pursuit of ECI's lawsuits in bankruptcy. The oil companies then brought their own suit seeking a declaration that the member-owners were ECI's alter egos and that ECI was solvent when it filed its bankruptcy petitions, such that the oil companies were entitled to recover from the member-owners whatever amounts the bankruptcy trustee recovered from the oil companies in its preference actions. 831 F.2d at 1341. The district court found that the oil companies had raised essentially the same allegations as those made by the trustee in bankruptcy. *Id.* We agreed. The oil companies' complaint alleged that they were injured only because of the member-owners' misuse of ECI and of ECI's corporate form, and that the oil companies were entitled to recover from the member-owners only due to the member-owners' manipulation of ECI to the plaintiffs' detriment. 831 F.2d at 1349.

> The injury alleged by the oil companies, it can be clearly seen, is to the corporation directly and to the oil companies indirectly. The trustee's complaint, as well, underscores that

> the debtor is a victim of the Member-Owners and has been harmed directly. The oil companies are only indirect or secondary victims; they have alleged nothing about their detrimental position that is peculiar and personal to them and not shared by ECI's creditors.

*Id.* Therefore, the oil companies' claim was general and could be pursued only by the trustee in bankruptcy.

In *Fisher*, by contrast, we found that a group of creditor-investors' fraud claims against a debtor's agents accrued to the creditor-investors personally. 155 F.3d at 877. In *Fisher*, the corporate debtor, Lake States, was a bogus commodities business that the individual debtor, Thomas Collins, and a group of accomplices had used as a "bucket shop," similar to a Ponzi scheme. After Collins' fraud was detected, he and Lake States were forced into bankruptcy. At the time of their bankruptcy filing, Lake States had only about $2 million in assets, not enough to satisfy its outstanding investor debt of about $64 million. In addition to the trustee's claims against the non-debtor accomplices to recover on behalf of the estate, a group of Lake States investors sought to bring securities, commodities and common law fraud claims outside the bankruptcy proceeding against the same non-debtor accomplices. To the extent that this group of creditor-investors sought to sue the accomplices merely to recover debts that arose out of the creditor-investors' transactions with Lake States, we held that they stood in the same

position as the rest of the investors, "pursuing identical resources for redress of identical, if individual, harms." 155 F.3d at 881. Unlike in *Koch*, however, we found that the creditor-investors' fraud claims were not the same as those available to the trustee, even though, if the creditor-investors were allowed to pursue their claims, "there might be nothing left in the defendants' coffers from which the bankrupt's estate could recover." *Fisher*, 155 F.3d at 881 (discussing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir.1988)). In this respect, we quoted approvingly the Second Circuit's holding in *Bankers Trust Co.*: " '[I]f [the creditor] Bankers was injured by [the non-debtor] defendants' acts, . . . it has standing to bring a RICO claim, regardless of the fact that a bankrupt BAC might also have suffered an identical injury for which it has a similar right of recovery.' " *Fisher*, 155 F.3d at 881 (quoting *Bankers Trust Co.*, 859 F.2d at 1101). Accordingly, in *Fisher* we held that the investor-creditors had independent, personal claims for fraud against the debtors' accomplices, even though their claims arose from the accomplices' misuse of the funds they had invested in Lake States. In finding that the investor-creditors' fraud claims were personal to them, we reasoned that fraud inflicts a separate and distinct injury on its victims, one that is inflicted directly on those victims by its perpetrators, and that sometimes may be redressed by punitive damages. The creditor-investors' injuries from that fraud may not have been fully measured by the debts the accomplices owed to Lake States for the misuse of the investors' funds. Therefore we held that the creditor-investors should be allowed to bring their

fraud suits—after the bankruptcy proceedings concluded—to recover any shortfall in their pro rata share as general creditors, as well as any individualized damages not compensated by their pro rata share. 155 F.3d at 883.

Nevertheless, in *Fisher* we upheld the bankruptcy court's jurisdiction to enjoin the creditor-investors' fraud claims because those claims were so closely related to the bankruptcy proceedings. We explained that in limited circumstances the trustee may temporarily block claims that are not property of the estate by petitioning the bankruptcy court to enjoin such claims, if they are sufficiently "related to" claims on behalf of the estate. 155 F.3d at 882 (citing 28 U.S.C. § 1334(b)). "The jurisdiction of the bankruptcy court to stay actions in other courts extends beyond claims by and against the debtor, to include 'suits to which the debtor need not be a party but which may affect the amount of property in the bankrupt estate,' or 'the allocation of property among creditors.' " 155 F.3d at 882 (quoting *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-62 (7th Cir.1994), and *In re Mem'l Estates, Inc.*, 950 F.2d 1364, 1368 (7th Cir.1992)). To protect this jurisdiction, the bankruptcy court may issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a); *Fisher*, 155 F.3d at 882. Thus, even though the investor-creditors' fraud claims were personal and distinct from claims that could be brought by other creditors, they were so related to the bankruptcy proceeding that, if not temporarily enjoined, they would have derailed those proceedings' efforts to recover for the class of creditors as a whole.

The case *sub judice*, however, is distinct from both *Koch* and *Fisher*. In both of those cases, the creditors' claims against the non-debtor fiduciaries depended on the non-debtor's misconduct *with respect to the corporate debtor*. In *Koch*, the oil companies sought to hold the member-owners liable based on their alleged breach of fiduciary duties to the debtor, ECI, 831 F.2d at 1340, and in *Fisher*, the creditor-investors' fraud claims were based on the accomplices' looting of the debtor corporation in which the plaintiffs had invested, 155 F.3d at 881. In this regard, general claims and claims that are "related to" the bankruptcy seemingly always involve transfers *from the debtor* to a non-debtor control person or entity. *See, e.g., In re MortgageAmerica Corp.*, 714 F.2d at 1275. To be sure, the case before us involves those facts as well—Teknek transferred all of its assets to the non-debtor Holdings, which is controlled by Kennett and Hamilton—but it also involves a separate non-debtor, Electronics, that is directly liable to SDI on the patent judgment without regard to the debtor's liability. SDI has already proven to a jury that Electronics inflicted an independent injury against it, and SDI has proven to the California district court that the alter egos inflicted an independent injury against Electronics—they looted Electronics and left it a shell—without regard to any injury Teknek inflicted on SDI, or any injury the alter egos inflicted on Teknek. SDI's claim against the alter egos does not depend on the alter egos' misconduct with respect to the debtor. SDI has equal recourse against the alter egos because of the injury suffered by Electronics. This distinction makes our case more like *In the Matter of Johns-Manville Corp.*, 26 B.R.

405 (Bankr.S.D.N.Y.1983), where the debtor and the non-debtors were sued as joint tortfeasors in asbestos product liability suits. The non-debtor co-defendants were not alter egos of the debtor, but rather were independent companies whom the plaintiffs alleged were jointly liable with the debtor for asbestos injuries. 26 B.R. at 407. Electronics is like the co-defendants in *Johns-Manville.* The presence of Electronics and its involvement in the underlying patent suit distinguishes this case from *Fisher*, where we held that "[w]hile the Apostolou Plaintiffs' claims are not 'property of' the Lake States estate, it is difficult to imagine how those claims could be more closely 'related to' it. They are claims to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy." 155 F.3d at 882. Here, though SDI's claims involve the same pool of money as the trustee's claims, and that money is in the possession of the same defendants (the alter egos), the claims are not based on the same acts. The alter egos looted both Teknek and Electronics. Those are separate acts, which caused separate injuries to two separate companies, only one of which is in bankruptcy.

The fact that the same alter egos controlled both Electronics and Teknek is not sufficient to bring SDI's claim against Electronics under the umbrella of the bankruptcy proceeding. With respect to the alter egos, this case is akin to "the more common case" referred to in *Fisher* where a creditor of a bankrupt files a claim against an insurer or guarantor of the bankrupt and is

allowed to proceed because the suit is " 'only nominally against the debtor because the only relief sought is against his insurer,' guarantor, or other similarly situated party." *Fisher*, 155 F.3d at 882-83 (quoting *In re Hendrix*, 986 F.2d 195, 197 (7th Cir.1993)). The alter egos in the case before us are like an insurer or guarantor. As in *Hendrix*, now that SDI's claim has been reduced to judgment, its collection action is only nominally against Electronics and Teknek, because the only relief sought is against the non-debtor alter egos. *See Hendrix*, 986 F.2d at 197 ("[A]s to whether such an injunction extends to a suit only nominally against the debtor because the only relief sought is against his insurer, the cases are pretty nearly unanimous that it does not.") (collecting cases).

A final distinguishing characteristic of this case is the fact that SDI is the debtor's only major creditor. Allowing SDI to settle its claim outside of bankruptcy therefore will have no effect on a larger class of creditors, and in this sense it will not "derail the bankruptcy proceedings." *Fisher*, 155 F.3d at 883. We do not make too much of this distinction, however. If not for the presence of Electronics, an independent non-debtor that is directly liable to SDI for the patent judgment, we would have been required under *Fisher* to find that SDI's claim was so related to the bankruptcy case that it could be properly enjoined by the bankruptcy court. As a procedural matter, the lack of other creditors would have served better as the basis for a motion to dismiss the bankruptcy proceeding than as the basis for the jurisdictional argument SDI makes

here. *See In re Am. Telecom Corp.*, 304 B.R. 867, 873 (Bankr.N.D.Ill.2004) (dismissing Chapter 7 case where debtor's two shareholders had filed bankruptcy petition only to avoid paying a judgment to the debtor's sole creditor, because such a petition "does not adequately implicate any of the policies that the U.S. Bankruptcy Code was enacted to serve"). SDI never filed such a motion. Still, the absence of other creditors is relevant. The trustee's "paramount duty" in Chapter 7 is to marshal the estate's assets for a pro rata distribution to all creditors. *See Koch*, 831 F.2d at 1352. To the extent that there is no larger creditor class, that duty will not be vindicated, and there is less of a principled basis for requiring a claim to be brought by the trustee rather than by the individual creditor.

## III.

Before concluding, we address a matter in tension with our jurisdiction. While this appeal was pending before us, the trustee filed a motion in the bankruptcy court to compromise all of his claims with Teknek's alter egos. On March 13, 2009, as our opinion was about to be issued, the bankruptcy court below issued a memorandum opinion purporting to grant the trustee's motion, *In re Teknek, LLC*, 402 B.R. 257, (Bkrtcy.N.D.Ill. 2009), notwithstanding this appeal, and in apparent violation of the ancient stricture that, when a case is on appeal, all lower courts lose jurisdiction over it and related matters. *In the Matter of Statistical Tabulating Corp., Inc.*, 60 F.3d 1286, 1289 (7th Cir.1995) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56,

58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)). The purpose of this rule is to avoid the confusion of placing the same matter before two courts at the same time and to preserve the integrity of the appeal process. *Whispering Pines Estates, Inc. v. Flash Island, Inc.*, 369 B.R. 752, 757 (Bkrtcy.App. 1 (N.H.) 2007). The situation before us is a perfect example of why this rule matters.

We came across the bankruptcy court's opinion approving settlement quite by chance; none of the parties brought it or the settlement to our attention. We immediately issued an order to the parties to address what effect this ruling might have on our appeal and to show cause why they should not be sanctioned for proceeding in apparent disregard of our jurisdiction. The alter egos did not respond to our order. They are not parties to this appeal, so perhaps that failure is excusable. SDI responded to our order with a tersely worded statement that it had no involvement in the settlement. Teknek responded with a slightly less terse filing, asserting that the settlement had no effect on our jurisdiction, because it involved the settlement of claims "separate and apart from the claims at issue in the present appeal." The trustee's response to our order to show cause provides the most context for the proceedings that have taken place in the bankruptcy court since the filing of this appeal. The trustee explains that, although he believes *his* settlement does not compromise our jurisdiction, he has previously been "vigilant in his defense of this Court's jurisdiction" in response to SDI's own attempts to impair our ability to

decide this appeal. The trustee reports that he has opposed both summary judgment by SDI—seeking dismissal by the bankruptcy court of the trustee's action now on appeal—as well as SDI's attempt to withdraw its claim from the bankruptcy, all on grounds that our appeal deprived the bankruptcy court of jurisdiction. These related facts only now come to our attention, SDI not having mentioned them in response to our order to show cause. These facts provide grounds for sanctioning SDI, as well as giving the trustee credit for getting the jurisdiction question right early on, though he has clearly gotten it wrong since then.

We cannot fathom how the bankruptcy court could lack jurisdiction to dismiss SDI yet retain jurisdiction to approve the settlement between the trustee and the alter egos. Indeed, as the trustee himself pointed out to the bankruptcy court in his response to SDI's motion to withdraw its claim, "[u]ntil the Seventh Circuit has ruled on the Trustee's appeal, this Court should take no action that would alter the status quo or result in any legal prejudice to the Estate's claims." Yet that is exactly what the bankruptcy court did when it approved the trustee's settlement. The trustee cannot have it both ways.

To be clear, while the trustee's settlement does not directly and specifically address the issues immediately before us, it purports to deal with matters that are integral to this appeal. The trustee brought the injunction action now on appeal only so that he could pursue SDI's claim against the alter egos on behalf of

the bankruptcy estate. But the trustee's settlement purports to compromise all of the trustee's claims against the alter egos, leaving little if anything for the trustee to pursue on that score. The trustee now focuses on other relief he might have obtained from SDI had he won this appeal (relief that is largely ignored in his brief): damages for SDI's violation of the automatic stay and a turnover of the settlement proceeds SDI received from the alter egos. But the trustee mitigated his damages by settling with the alter egos outside our jurisdiction; any turnover of SDI's settlement proceeds would have been followed quickly by a return of those proceeds to SDI, the sole creditor in this case. Thus, although the matter on appeal is technically a separate adversary proceeding from the matter at issue in the trustee's settlement, the relationship is so close that it is obvious that the bankruptcy court lacked jurisdiction to approve the settlement. Therefore, the bankruptcy court's purported approval of the settlement is null and void. Moreover, because the trustee is required to get the bankruptcy court's approval before settling claims, the settlement itself is apparently of no effect. *See* Fed. R. Bankr.P. 9019; *see also, e.g., Yorke v. N.L.R.B.*, 709 F.2d 1138, 1147 (7th Cir.1983). Because the settlement does not purport to settle the issues directly before us, however, and because the settlement has not been validly approved by the bankruptcy court, the case before us is not moot and we retain jurisdiction to decide it. *See In re Markarian*, 228 B.R. 34, 48 (Bkrtcy.App.1 (Mass)1998) ("Since the Bankruptcy Court had no jurisdiction to approve the parties' compromise and enter dismissal, those orders are void; therefore, a case

or controversy still existed when the Panel issued its October 28, 1998 Order.").

One final issue remains, and that is proper sanctions. We think a sanction of $5,000 against the trustee, payable to the court, for entering the rogue bankruptcy settlement at issue here is sufficient to deter similar actions in derogation of this court's jurisdiction in the future, while recognizing that the trustee acted correctly in opposing SDI's various motions below. We sanction SDI the same amount for its abortive attempts to extricate itself from the bankruptcy, again in apparent disregard of our exclusive jurisdiction over these matters. We leave to the bankruptcy court in due course the decision whether to sanction the alter egos, who are not before this court.

The district court's holding that SDI's claim is not property of the Teknek estate or related to the bankruptcy proceeding is Affirmed, and the district court's vacation of the preliminary injunction order is also Affirmed.

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED DECEMBER 21, 2007

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

No. 07 C 5229
Bankruptcy No. 05 C-27545
Adversary Case No. 07-00583

In re TEKNEK, LLC,

*Debtor.*

PHILLIP D. LEVEY,

*Plaintiff/Appellant,*

v.

SYSTEMS DIVISION, INC.,

*Defendant/Appellee.*

**MEMORANDUM OPINION AND ORDER**

REBECCA R. PALLMEYER, District Judge.

Teknek, LLC ("Teknek") was found guilty of willful patent infringement in August 2004 and filed for bankruptcy in July 2005. The bankruptcy court has

enjoined Systems Division, Inc. ("SDI")—the entity whose patents Teknek infringed—from collecting its patent infringement judgment from Teknek, its owners, and certain affiliated entities, all of whom are judgment debtors. SDI appeals this injunction and, for the reasons set forth below, the court vacates the injunction, except insofar as proceedings are stayed against Teknek pursuant to the automatic stay provision of the Bankruptcy Code. The case is remanded to the bankruptcy court for further proceedings.

## BACKGROUND

### I. Patent Proceedings

The conflict that gives rise to this litigation began more than seven years ago. SDI filed patent infringement claims against Teknek and Teknek Electronics, Ltd. ("Electronics") in the United States District Court for the Central District of California on February 7, 2000. *Sys. Div., Inc. v. Teknek Elecs. Ltd.*, Case No. 00-cv-135-DOC-AN (C.D.Cal.).[1] Four and a half years later, SDI's claims were tried before a jury, which found that Teknek and Electronics had committed patent infringement. On August 18, 2004, District Judge David O. Carter entered a judgment in favor of SDI and against Teknek and Electronics for willful patent

1. Citations to motions and orders in the patent infringement case will refer to the electronic docket available online and be styled "00-cv-135 Docket Entry No. ___." Following the same format, the court will also cite to the electronic docket of the relevant bankruptcy cases.

infringement. (00-cv-135 Docket Entry No. 251.) SDI was awarded $3 million plus prejudgment interest and costs. (*Id.*) On November 5, 2004, the court entered an order awarding SDI prejudgment interest totaling $771,555.25. (00-cv-135 Docket Entry No. 289.)

SDI ran into difficulties protecting and collecting the $3.8 million judgment. On January 20, 2005, SDI filed an application and order for appearance and judgment debtor examination. (00-cv-0135 Docket Entry No. 334 at 3.) On March 7, 2005, Magistrate Judge Arthur Nakazato continued the examination to April 7, 2005. (*Id.*) On April 18, 2005, Judge Carter entered an order holding Electronics in contempt for failure to appear at the judgment debtor examination and ordering Electronics to pay reasonable costs and attorneys' fees incurred by SDI as it attempted to enforce the judgment. (*Id.* at 7.) As Teknek had not been served with a notification of the examination, Teknek was not held in contempt. (*Id.* at 6.) The court also enjoined Electronics from carrying on business in the United States or "transferring or disposing of any of their assets (including monetary assets) to any other Defendant or any third party, or from transferring any assets (including monetary assets) out of the United States." (*Id.* at 7-8.) This injunction was to remain in place until Electronics appeared for a judgment debtor examination. (*Id.* at 8.)

After SDI filed its patent infringement claims but before the final judgment was filed, the judgment debtors—Teknek and Electronics—transferred their

assets to a third entity: Teknek Holdings, Ltd. ("Holdings"). In June 2005, SDI moved to add Jonathan Kennett, Sheila Hamilton, and Holdings as judgment debtors. (00-cv-135 Docket Entry No. 486 at 4.) Kennett and Hamilton are Scottish citizens. (*Id.* at 3.) Kennett owns 85% of Teknek and Holdings; Hamilton owns the remaining 15% of each entity. (*Id.* at 2-3.) Electronics is now a wholly-owned subsidiary of Holdings but, before it became a Holdings subsidiary, it also was wholly owned by Kennett (85%) and Hamilton (15%). (*Id.* at 2.) Judge Carter found that Holdings was formed in April 2000, that is, approximately two months after SDI filed its patent infringement lawsuit against Teknek and Electronics. (*Id.* at 2.) Nearly all of Teknek's and Electronics' assets were transferred to Holdings once it was formed, rendering both Teknek and Electronics insolvent. (*Id.*) Judge Carter found that the fraudulent transfers of assets from entities wholly controlled by Kennett and Hamilton (Teknek and Electronics) to another company wholly controlled by Kennett and Hamilton (Holdings)—indeed, entities controlled in the same 85-15 ratio—deprived SDI of its ability to collect its judgment from Teknek and Electronics. (00-cv-135 Docket Entry No. 486 at 15-18.) Judge Carter also found that to add Holdings, Kennett, and Hamilton as judgment debtors would not offend due process, given the control they had over litigation of the patent proceedings. (*Id.* at 18-21.) On January 3, 2007, he ordered that Holdings, Kennett, and Hamilton be added as judgment debtors in the patent infringement action under either a theory of alter ego or of successor liability. (*Id.* at 2-3.)

Holdings, Kennett, and Hamilton appealed this order to the Federal Circuit, which affirmed Judge Carter. *Sys. Div.*, 2007 WL 3151697, at *1. The Federal Circuit found that Teknek "sold" all of its assets to Holdings in 2004, and that there is no evidence that Teknek received any compensation for that sale. *Id.* Electronics also transferred its assets to Holdings, and there is no evidence that Teknek received any compensation for doing so. *Id.* Ultimately, Electronics became a wholly owned subsidiary of Holdings, although the Federal Circuit's opinion does not say precisely when this occurred. *Id.* Electronics paid "dividends" to Holdings, including a £3.5 million dividend in 2003 (shortly after a grant of summary judgment for the defendants was reversed)[2] and a £1.5 million dividend in 2004 (shortly before the jury verdict in favor of the plaintiff). *Id.* The Federal Circuit therefore affirmed the order adding Kennett, Hamilton, and Holdings as parties to the 2004 verdict and judgment of infringement on the theory that they fraudulently transferred assets from Teknek and Electronics to themselves, thereby preventing SDI from collecting its patent infringement judgment. *Id.*

Following the transfer of assets from Teknek and Electronics to Holdings, Teknek and Electronics were

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2. In September 2001, Judge Carter granted summary judgment motion for defendants on the ground of patent invalidity. (00-cv-135 Docket Entries No. 121 & 122.) SDI appealed that order (00-cv-135 Docket Entry No. 125), and the Federal Circuit reversed and remanded in February 2003 (00-cv-135 Docket Entry No. 138.)

insolvent. (00-cv-135 Docket Entry No. 486 at 2.) On May 26, 2005, Electronics, a Scottish company, filed an insolvency petition in the United Kingdom, and Teknek filed its Chapter 7 bankruptcy petition in the United States on July 12, 2005. (*Id.* at 3; *see also Sys. Div., Inc. v. Teknek Elecs., Ltd.*, No.2007-1162, 2007 WL 3151697, at *1 n. 1 (Fed.Cir. Oct.26, 2007).) Electronics' bankruptcy proceedings are not at issue in this appeal, which is focused solely on the Teknek bankruptcy proceedings before Bankruptcy Judge Jacqueline P. Cox. Teknek and Electronics made Judge Carter aware of their bankruptcy filings and, on August 1, 2005, Judge Carter stayed all proceedings and pending motions in the patent infringement matter. (00-cv-135 Docket Entry No. 459.) Without articulating his reasons for doing so, Judge Carter lifted the stay on October 5, 2006, at SDI's request. (00-cv-135 Docket Entry No. 470.) Only after Judge Carter lifted the stay did he add Holdings, Kennett, and Hamilton as judgment debtors.

While the Federal Circuit appeal was pending, SDI continued its attempts to collect on the $3.8 million judgment. SDI moved to hold defendants in contempt for violating court orders relating to the failure to pay the judgment or cooperate with judgment debtor examinations on April 6, 2007; because defendants' counsel advised the court that defendants had agreed to pay the outstanding judgment, Judge Carter continued the hearing on the motion to July 23, 2007. (00-cv-135 Docket Entry No. 525.) In June 2007, while that contempt motion was pending, Teknek's Trustee in bankruptcy filed an adversary proceeding against

SDI, seeking to recover the assets Teknek transferred before it became insolvent. (07-ap-583 Docket Entry No. 1.) On June 26, Judge Cox issued a preliminary injunction, prohibiting SDI from prosecuting claims or collecting on account of claims from Teknek, Hamilton, Kennett, and "the Teknek parties." (07-ap-583 Docket Entry No. 13.) While Teknek's bankruptcy proceedings will be discussed in more depth below, it is clear that this preliminary injunction implicated SDI's attempts to collect its patent infringement judgment from the judgment debtors. Nevertheless, SDI continued its attempts to collect. On July 17, 2007, Judge Carter again placed the proceedings on hold, this time until September 10, 2007. (00-cv-135 Docket Entry No. 540.) In his order granting another continuance, Judge Carter noted that the bankruptcy court had entered a preliminary injunction barring SDI from collecting its judgment, and that settlement discussions between Holdings and the Teknek Trustee were underway. (*Id.*) On September 10, Judge Carter continued the hearing until September 25, 2007 and issued a tentative order holding the five defendants in contempt. (00-cv-135 Docket Entry No. 549.)[3] Four days later and following a teleconference with the bankruptcy judge and attorneys in Illinois in which he learned that the bankruptcy judge had modified the injunction in place, he issued a revised version of that tentative order. (00-cv-135 Docket Entry No. 546.)

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3. The tentative order is not in the record, but there is no indication that it is substantively different from the subsequent tentative and final order.

*Appendix B*

On October 3, 2007, SDI requested that Judge Carter and the Northern District of Illinois consult to clarify the bankruptcy court's jurisdiction. (00-cv-135 Docket Entry No. 552.) Holding that the appeal currently before this court is the proper avenue for SDI to pursue, Judge Carter denied this request on October 12. (00-cv-135 Docket Entry No. 561.) On the same day, Judge Carter held Holdings, Kennett, and Hamilton in contempt, issuing an expanded version of his amended tentative order. (00-cv-135 Docket Entry No. 563 at 22.) His final order expressly examined the jurisdiction of the bankruptcy court to enjoin proceedings in the Central District of California, which the tentative order had not; ultimately, however, the order imposed the same sanctions contemplated in the amended tentative order. (*Id.*; *see also* 00-cv-135 Docket Entry No. 546.) In his contempt order, Judge Carter declined to exercise his power under the All Writs Act, 28 U.S.C. § 1651(a) but made clear that he would exercise this power to enjoin attempts to enforce the bankruptcy court's injunction in his court. (00-cv-135 Docket Entry No. 563 at 16.) By way of sanctions, he enjoined the judgment debtors—Teknek, Electronics, Holdings, Kennett, and Hamilton—from carrying on business within the United States, from transferring assets to any other defendant or third party, and from transferring any assets out of the United States. (*Id.* at 22.) He imposed these same restrictions on Teknek Manufacturing Ltd., Teknek Japan Ltd., Teknek China Ltd., Teknek Howwood Ltd., Teknek Automation A/S, Teknek Asia Ltd., Teknek Europe

Ltd., and Kenham LLC. (*Id.*)[4] These injunctions were to remain in effect until Holdings appeared for a judgment debtor examination and provided SDI with certain documents. (*Id.* at 23.) Finally, he ordered Holdings, Kennett, and Hamilton to provide SDI with certain information about the various Teknek entities, including a list of all employees, officers, directors, agents, representatives, and licensees; an accounting of revenue and accounts receivable; and customer lists. (*Id.*) On November 9, 2007, the Teknek Trustee as well as Holdings, Kennett, and Hamilton filed notices of appeal. (00-cv-135 Docket Entries No. 576 & 578.) Their appeals are currently pending before the Federal Circuit.

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4. Judge Carter referred to these various companies as the "Teknek Entities," but the precise relationship among them is not clear. In adversary proceedings filed before the bankruptcy court in 2006, the Trustee has alleged that Holdings is the holdings company under whose umbrella Teknek Manufacturing Ltd., Teknek Japan Ltd., Teknek China Ltd., Teknek Howwood Ltd., Teknek Asia Ltd., and Teknek Europe Ltd. operate. (06-ap-412 Docket Entry No. 63 ¶ 16 n.1.) Kenham is a successor company to Teknek. The Trustee alleges that Teknek's business essentially reopened, after it was divested of its valuable assets and ceased operations, as a new entity called Teknek America. (*Id.* ¶ 32.) Teknek America, LLC changed its name to Kenham, LLC after selling all of its assets (other than its accounts receivable), and any money owed to Teknek America is paid to Kenham, LLC. (*Id.* ¶ 14.) Teknek Automation A/S is not specifically mentioned in the adversary proceedings.

*Appendix B*

## II. Bankruptcy Proceedings

As described briefly above, in the wake of the $3.8 million patent infringement judgment, Teknek filed for voluntary bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois on July 12, 2005, Bankruptcy Case No. 05-27545. (Brief of Appellee Phillip D. Levey, Trustee in Bankruptcy for the Estate of Teknek, LLC ("Levey Br.") at 4; Brief of Appellant, Systems Division, Inc. ("SDI Br.") at 3.) Teknek's bankruptcy proceedings are currently pending before Bankruptcy Judge Cox. In the bankruptcy proceedings, Teknek disclosed $73.22 in assets and $3.79 million in liabilities. (SDI Br. at 3.) Lawrence Fisher was appointed as the original bankruptcy trustee. (Levey Br. at 4-5.)[5] On July 20, 2005, SDI, through its attorneys, filed an appearance in the bankruptcy court. (*Id.* at 5.) On February 1, 2006, SDI filed a claim for $3,823,564.90 in the bankruptcy proceedings. (*Id.*; Systems Division, Inc. Proof of Claim, Ex. 25 to Levey Br. at Ex. A.)

In addition to the Teknek bankruptcy case, there are two associated adversary proceedings pending before Judge Cox. On January 19, 2006, Fisher, as Teknek Trustee, initiated adversary proceedings against a number of individuals and entities, including Kennett, Hamilton, and Holdings, *see* Adversary Proceeding No. 06-412. In that action, the Teknek

5. The Trustee makes much of the fact that the same lawyers represented Fisher and SDI. (Levey Br. at 5-7.) But the court is uncertain of how, if at all, this alters the facts of this appeal.

Trustee seeks to recover the assets fraudulently transferred by Teknek in an attempt to avoid paying the judgment owed to SDI. After Fisher resigned as the Teknek Trustee for medical reasons on May 31, 2006, Phillip D. Levey was appointed the successor trustee for the Teknek estate. (Levey Br. at 6.) Levey commenced adversary proceedings against SDI on June 22, 2007, Adversary Proceeding No. 07-00583. (Levey Br. at 8.) Levey sought, among other relief, a preliminary and a permanent injunction enjoining SDI from collecting or otherwise pursuing collection of the patent infringement judgment from Kennett, Hamilton, and Holdings. (*Id.*) The court granted the Teknek Trustee's motion for a preliminary injunction on June 26, and on June 29, 2007 entered an order enjoining SDI from collecting or taking any action against: Teknek, Hamilton, Kennett, Holdings, Electronics, and certain Teknek affiliates: Teknek America, LLC; Kenham, LLC; and Tekena, LLC. (*Id.* at 8-9; SDI Br. at 5.) The preliminary injunction remained in effect until July 27, 2007. (Levey Br. at 8-9.)

A few weeks before the preliminary injunction was set to expire, SDI moved to modify its terms. (SDI Br. at 5.) On July 13, 2007, Judge Cox extended the injunction through August 28, 2007 and continued SDI's motion to modify the preliminary injunction order until that same date. (*Id.* at 5.) On August 21, 2007, the Teknek Trustee moved for a permanent injunction and for authority to compromise. (SDI Br. at 6.) The Trustee argued that Holdings would satisfy the outstanding patent infringement judgment if and only if a permanent

injunction were issued preventing SDI and anyone affiliated with SDI from collecting or otherwise pursuing collections of that judgment. (*Id.*) SDI countered that Holdings' proposed payment would not fully satisfy the judgment. (*Id.*) Judge Cox noted that SDI never appealed the June 29, 2007 order granting the preliminary injunction; SDI agreed to the extension of the preliminary injunction to August 28, 2007; and there had been no material changes to the facts or circumstances surrounding the first motion for a preliminary injunction. (07-ap-583 Docket Entry No. 78 at 4.) Thus, Judge Cox extended the preliminary injunction to and through November 27, 2007. (*Id.*) On September 5, SDI filed a Notice of Appeal with this court.

## DISCUSSION

### I. Jurisdiction

SDI appeals the bankruptcy court's entry of the June 29, 2007 and August 28, 2007 preliminary injunction orders. SDI suggests that the court's jurisdiction is grounded in 28 U.S.C. § 158(a)(1), which entrusts district courts with jurisdiction to hear appeals "from final judgments, orders, and decrees." In non-bankruptcy proceedings, appeals of the grant of preliminary injunctions are considered interlocutory. 28 U.S.C. § 1292(a)(1); *Duct-O-Wire Co. v. United States Crane*, 31 F.3d 506, 508 (7th Cir.1994). In bankruptcy proceedings, however, courts construe finality more liberally than in non-bankruptcy proceedings. *In re*

*Forty-Eight Insulations*, 115 F.3d 1294, 1299 (7th Cir.1997). Thus, the Ninth Circuit has recently held that an injunction staying arbitration proceedings is appealable as a final order. *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1092 (9th Cir.2007).

This court will, however, review the preliminary injunction even if it does not technically constitute a "final order"—that is, one which, even under the broader definition appropriate in the context of a bankruptcy appeal, "ultimately determine[s] a creditor's position in the bankruptcy proceeding." *Forty-Eight Insulations*, 115 F.3d at 1299. Even if the preliminary injunction at issue here does not ultimately determine SDI's position in the bankruptcy proceeding, this court may exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(3). *Id.* ("the district court may choose to take jurisdiction from interlocutory orders of bankruptcy courts"). Particularly given that a dispute has arisen between a District Judge in the Central District of California and a Bankruptcy Judge in the Northern District of Illinois, exercise of the discretionary jurisdiction is both appropriate and necessary. There is no dispute that SDI followed the proper procedures for appealing the interlocutory order and, thus, the court has jurisdiction over this appeal.

## II. The Bankruptcy Court's Injunction

### A. Standard of Review

When reviewing the bankruptcy court's determination that Teknek was entitled to a preliminary injunction, the court reviews the bankruptcy "court's findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions *de novo.*" *Bhd. of Maint. of Way Employees v. Union Pac. R.R. Co.*, 358 F.3d 453, 457 (7th Cir.2004) (articulating the standard in context of reviewing district court's grant or denial of a preliminary injunction).

### B. Enjoining Proceedings Against Teknek

It is undisputed that the Bankruptcy Code's automatic stay provision prohibits SDI from collecting on its judgment from Teknek. The Bankruptcy Code provides that a bankruptcy petition "operates as a stay, applicable to all entities, of—(1) the commencement or continuation . . . of a judicial . . . action or proceeding . . . to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a). The language of this provision explicitly extends the "automatic stay provision only to the debtor filing bankruptcy proceedings and not to nonbankrupt co-defendants." *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir.1983) (per curium); *see also Seiko Epson Corp. v. Nu-Kote Int'l, Inc.*, 190 F.3d 1360, 1364 (Fed.Cir.1999) ("the automatic stay does

not apply to non-bankrupt co-defendants of a debtor 'even if they are in a similar legal or factual nexus with the debtor.' ") (citation omitted) (collecting cases). And indeed, the Trustee makes explicit that he does not disagree with this reading of *Pitts*. (Levey Br. at 17.) Accordingly, the automatic stay prevents SDI from collecting its patent infringement against Teknek. The dispute here is whether the stay—or any other authority afforded to the bankruptcy court—extends to prohibit action as against the other judgment debtors as well.

### C. Enjoining Proceedings Against Non-Debtors

#### 1. Property of the Estate

The Trustee acknowledges that "this case does not turn on the scope of § 362(a), but instead involves a § 105(a) injunction issued to protect property of a bankruptcy estate and a trustee's pursuit of a defendant being simultaneously pursued by a creditor" (Levey Br. at 17.) Yet the June 29 Preliminary Injunction Order is based on the bankruptcy court's finding that "SDI's purported claims under the SDI Motion are claims of the Estate." (07-ap-583 Docket Entry No. 14 ¶ Z.) The Order explicitly invokes section 362, stating that the Trustee has good cause for relief because "(a) the Trustee has a substantial likelihood of success on the merits under § 362 and (b) the preliminary injunction will serve to protect the Estate's interests and will not harm any public interest." (*Id.* ¶ DD.) Based on this evidence, the bankruptcy court enjoined SDI from collecting upon any claims against not only the debtor

but also Hamilton, Kennett, and the Teknek Affiliates, defined to include Holdings; Electronics; Teknek America, LLC; Kenham, LLC; and Tekena, LLC. (*Id.* at 8.) Extending that injunction on August 28, 2007, Judge Cox reaffirmed that the Trustee was the proper party to pursue alter ego claims and that "SDI's purported claims . . . are claims of the Estate." (07-ap-583 Docket Entry No. 78 at 4.) Similarly, the Trustee has argued that, by filing claims against Teknek's estate, SDI effectively assigned its claims to the estate. (Levey Br. at 13.)

It is true that a bankruptcy court has exclusive jurisdiction over the property of the debtor's estate. 28 U.S.C. § 1334(e). To begin, then, the court will consider whether SDI's attempts to collect are claims of the debtor's estate. This requires defining the nature of the liability of Holdings, Kennett, and Hamilton as judgment debtors. With regard to enforcing judgments, the Federal Rules provide that "procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1); *see also Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 421 (9th Cir.1998). Section 187 of the California Code of Civil Procedure empowers California courts to amend the judgment to add additional judgment debtors based on an alter ego theory of liability. *See Levander v. Prober (In re Levander)*, 180 F.3d 1114, 1120-21 (9th Cir.1999); *Dow Jones Co. v. Avenel*, 151 Cal.App.3d 144, 148, 198

Cal.Rptr. 457 (Cal.Ct.App.1984). Where the alter ego doctrine applies, a corporations' shareholders are jointly and severally liable for the entirety of the corporation's debts. *Minn. Mining & Mfg. Co. v. Superior Court*, 206 Cal.App.3d 1025, 1028, 253 Cal.Rptr. 908 (Cal.Ct.App. 1988); 14 *Ballantine and Sterling, Cal. Corp. Laws* § 299.06. Indeed, the Trustee acknowledges that Holdings, Kennett, and Hamilton are "jointly and severally liable for the full amount of the underlying Judgment. That, of course, is the whole point of alter ego liability." (Levey Br. at 14.) Thus, Electronics, Holdings, Kennett, and Hamilton are judgment debtors directly liable for the $3.8 million judgment. *See Bd. of Trustees v. Elite Erectors, Inc.*, 212 F.3d 1031, 1038 (7th Cir.2000) ("Efforts to pierce the corporate veil ask a court to hold A vicariously liable for B's debt. . . . But a contention that A is B's 'alter ego' asserts that A and B are the same entity; liability then is not vicarious but direct.").

In light of this, SDI's collection claims are not property of the Teknek estate for two reasons. First, the Seventh Circuit has held that a creditor's claims are not part of the bankruptcy estate where the claims seek to remedy harm to the creditor and no other claimant or creditor has an interest in the cause. *Fisher v. Apostolou*, 155 F.3d 876, 879 (7th Cir.1998), quoting *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir.1987). SDI does not seek to recover assets wrongfully transferred from the debtor to Holdings, Kennett, and/or Hamilton. Rather, SDI seeks to collect its patent infringement judgment

directly from Electronics, Holdings, Kennett, and Hamilton. That patent infringement judgment remedies a harm unique to SDI, and no other creditor has an interest in that judgment. *See id.* at 879-81. Electronics, Holdings, Kennett, and Hamilton are directly liable to SDI for the patent infringement judgment, and neither Teknek nor any claimant or creditor has any interest in that judgment. Thus, SDI's claims are personal and do not belong to the estate. *See id.*

Second, Judge Carter employed section 187 and held Holdings, Kennett, and Hamilton liable as judgment debtors "in large part" because of the fraudulent transfers involving Electronics. (00-cv-135 Docket Entry No. 563 at 11 n. 6.) The Trustee claims to be the owner of an alter ego claim "against the Alter-Egos" (Levey Br. at 24), but the Electronics bankruptcy proceedings are not before Judge Cox or in any way related to the Teknek bankruptcy proceedings. Thus, the Trustee cannot own alter ego claims involving Electronics' fraudulent transfers. *See Wayne Film Sys. Corp. v. Film Recovery Sys. Corp.*, 64 B.R. 45, 50 (N.D.Ill.1986) ("a trustee does not stand in the shoes of the bankrupt's creditors for all purposes. Rather, if a creditor has a claim against a third party, however that third party may be related to the bankrupt, the trustee has no standing to pursue that creditor's claim against the third party, even if the claim is common to many creditors."). Even if the Trustee "owns" alter ego claims involving Teknek, SDI retains independent claims reduced to judgment by Judge Carter. Thus, the Trustee's ownership of certain alter ego claims does not render all of SDI's collection attempts property of the estate.

**2. Related-to Jurisdiction**

Although, as noted, the bankruptcy court appears to invoke section 362, the Trustee argues that section 105 of the Bankruptcy Code, as opposed to section 362, authorizes the injunction. (Levey Br. at 17.) Indeed, the bankruptcy court did rely at least in part on section 105 when granting the preliminary injunction. (07-ap-583 Docket Entry No. 14 ¶ DD.) Congress has empowered bankruptcy courts, to whom bankruptcy cases are referred pursuant to 28 U.S.C. § 157(a), to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105. Section 105, however, does not provide an independent source of subject matter jurisdiction. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224-25 (3d Cir.2004). Instead, the bankruptcy court's jurisdiction is determined by Congress. *See Kontrick v. Ryan*, 540 U.S. 443, 452, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Where a bankruptcy case is pending, the court has non-exclusive jurisdiction over all civil proceedings arising under and related to cases under title 11. 28 U.S.C. § 1334(b). Thus, a bankruptcy court may, under certain circumstances, temporarily enjoin non-debtors from bringing certain claims. In this case, the question is whether SDI's attempts to collect from Electronics, Holdings, Kennett, and Hamilton are sufficiently "related to" the bankruptcy proceedings that the bankruptcy court has jurisdiction to stay them.

In the Seventh Circuit, the definition of the bankruptcy court's "related to" jurisdiction is limited.

*In re FedPak Sys.*, 80 F.3d 207, 213 (7th Cir.1996). As explained in *FedPak*, "[a] case is related to a bankruptcy when the dispute affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors." *Id.* at 213-14 (internal quotation marks and citations omitted). Interpreting "related to" jurisdiction narrowly respects Article III, reflects principles of comity among the courts, and is good common sense. *Id.* at 214. Thus, only "[i]n limited circumstances" do bankruptcy judges temporarily block adjudication of those claims that "may affect the amount of property in the bankrupt estate" or "the allocation of property among creditors." *Fisher*, 155 F.3d at 882 (citations omitted); *cf. Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (related-to jurisdiction is a grant of "some breadth" but "cannot be limitless").

In reasoning that the bankruptcy court had related-to jurisdiction, the Trustee focuses primarily on *Fisher*, a case that he contends is analogous to this dispute. In *Fisher*, a group of investors were defrauded by a corporation and an individual, each of whom later became insolvent and filed for bankruptcy. *Fisher*, 155 F.3d at 878. The defrauded investors then filed fraud suits against certain accomplices to the debtors in bankruptcy. *Id.* The bankruptcy court enjoined the investors' lawsuits, finding that the claims were the property of the debtors' estates and therefore covered by the automatic stay provision as well as under section 105. *Id.* at 879. The district court vacated the injunction, holding that the investors' claims were not property of

the bankrupt estates and that the trustee did not have standing to assert them. *Id.* The district court further held that, as a party to the fraud, the debtor (through its trustee) could not bring suit against the accomplices. *Id.* On appeal, the Seventh Circuit agreed that the investors' claims were not part of the debtors' estates. *Id.* at 883. It nevertheless reinstated the injunction based on related-to jurisdiction. *Id.* It held that the investors were redressing "identical, if individual, harms." *Id.* at 881. The Seventh Circuit held that the investors' claims, which implicated "the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy," were related to the bankruptcy estate and thus fell within the bankruptcy court's jurisdiction. *Id.* at 882.

While *Fisher* does set out the governing principles in this appeal, this case is factually different in several important ways. In *Fisher*, there were 244 investors suing in their individual capacities, and approximately 450 similarly situated individuals. *Fisher*, 155 F.3d at 878. Here, SDI stands alone; there are no similarly situated parties and no identical harms inflicted by the debtor. Thus, the bankruptcy court need not allocate assets among similarly situated entities. In *Fisher*, the debtors, who had operated a Ponzi scheme, had only about $2 million of the $100 million taken in when they filed for bankruptcy. *Id.* The Ponzi scheme was the subject matter of the investors' lawsuit as well as the force driving the debtors into bankruptcy. *Id.* Here, the wrongful conduct underlying SDI's lawsuit was willful

patent infringement, and the fraud perpetrated by Teknek was merely an attempt to avoid paying the judgment it owed SDI. In other words, Teknek's fraud was not the same underlying wrong remedied by SDI's substantive claims. SDI's claims are for patent infringement, not alter ego. Indeed, Holdings, Kennett, and Hamilton are directly responsible for the judgment entered against Teknek and Electronics. These differences go to the heart of the bankruptcy court's jurisdiction, because they impact the relatedness of SDI's claims to the bankruptcy estate at issue.

This case is also not *Celotex*. In that case, respondents had filed suit in the District Court for the Northern District of Texas against petitioner, Celotex, and others for alleged asbestos-related injuries. *Celotex*, 514 U.S. at 302. A judgment was entered for respondents, and Celotex posted a supersedeas bond with a surety. *Id.* Celotex then filed for bankruptcy in the Bankruptcy Court for the Middle District of Florida before respondents could collect on their judgment. *Id.* The Florida bankruptcy court issued an injunction pursuant to section 105, which stayed all proceedings involving Celotex. *Id.* at 303. The Texas district court nevertheless permitted respondents to execute against the surety on the bond, and the Fifth Circuit affirmed. *Id.* at 304-05. Before the Supreme Court, respondents acknowledged that the Florida bankruptcy court's injunction prohibited them from executing against the surety on the bond posted by Celotex, but challenged the jurisdiction of the bankruptcy court to enter the injunction. *Id.* at 306-07. The Supreme Court noted that

the bankruptcy court asserted related-to jurisdiction because allowing the respondents and 227 other bonded judgment creditors to execute on the bonds would affect Celotex's ability to undergo a successful reorganization in Chapter 11 bankruptcy proceedings. *Id.* at 310. Here, there are not hundreds of creditors seeking to recover, nor a Chapter 11 bankruptcy proceeding involving a reorganization—this Chapter 7 proceedings is one in which the bankruptcy court's jurisdiction narrower than it was in *Celotex*. *Id.* ("it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bankruptcy courts may extend more broadly in the former case than in the latter."). The interests at stake here are different than those in *Celotex*. Moreover, The Supreme Court also found that respondents ought to have challenged the injunction in bankruptcy court and appealed to the district court and ultimately to the Eleventh Circuit rather than collaterally attacking the injunction in the Texas federal courts. *Id.* at 313. Here, SDI has pursued just such a direct appeal. Accordingly, neither *Fisher* nor *Celotex* answers the question of whether the bankruptcy court had jurisdiction.

The court must therefore examine the particular facts of this case to determine whether SDI's collection attempts are related to the estate's claims. It is useful to begin by considering the adversary proceedings the Trustee has brought to recover the fraudulently transferred assets, *In re Teknek*, Adversary Proceeding No. 06-412. There, the Trustee has brought claims

against Hamilton and Kennett (as well as four other individuals) and two entities: Tekena USA and Kenham LLC. (06-ap-412 Docket Entry No. 63.) In the Amended Verified Adversary Complaint, the Trustee alleges that Tekena is an Illinois limited liability company that, in September 2005, purchased the assets and name of Teknek America. (*Id.* ¶ 13.) The Trustee also alleges that Kenham is an Illinois limited liability company formed in June 2004 as Teknek America, LLC; upon selling its name and assets (other than accounts receivable) in September 2005, it adopted the name Kenham. (*Id.* ¶¶ 14, 17.) In the adversary proceeding, the Trustee seeks to recover assets fraudulently transferred from Teknek in an attempt to avoid paying the patent infringement judgment owed to SDI. (*Id.* ¶¶ 1-3.) The Trustee has not named Holdings as a defendant in that or any other adversary proceeding that the court can find.

**a. Estate's Ability to Collect**

Although SDI's attempts to collect on its patent infringement judgment are not property of the Teknek estate, the question remains whether those transfers are sufficiently "related to" the estate to justify the bankruptcy court's exercise of jurisdiction. The Trustee argues that, if SDI collects against Electronics, Holdings, Kennett, or Hamilton, this would extinguish their debt (if any) to the estate. (Levey Br. at 20.) But as explained above, SDI's patent infringement judgment is a debt separate and distinct from any fraudulent transfer or alter ego claims the estate might

have. SDI does not seek to recover the assets Teknek fraudulently transferred to Holdings. Rather, it seeks to recover directly from the judgment debtors the patent infringement claims reduced to judgment by Judge Carter. Electronics, Holdings, Kennett, and Hamilton are liable to SDI on the patent infringement judgment *and*, if proven, to the estate for the fraudulent transfers.

Collection by SDI therefore will not prevent the Trustee from collecting on its claims against Holdings. *See* 47 Am.Jur. 2d *Judgments* § 827 ("Satisfaction against one party does not serve to release other parties from liability on a different debt, obligation, or cause of action."); *In re Better Care, Ltd.*, 97 B.R. 405, 415 (Bankr.N.D.Ill.1989) (holding that payment of a judgment creates a right to satisfaction, but there may exist "numerous other state or federal causes of action . . . none of which would be preempted or discharged by this judgment."). In other words, Electronics, Holdings, Kennett, and Hamilton are liable to SDI and the Teknek estate (if they are liable to the estate) on different debts, and they may be required to pay both of them. Given that Holdings, Kennett, and Hamilton, on the one hand, and Teknek and Electronics, on the other hand, were deemed indistinguishable by the Central District of California and Federal Circuit at the time the debts were incurred, equity does not preclude this result.

**b. Identifying Teknek Assets**

There might be an argument for exercising related-to jurisdiction if each fraudulent transfer implicated Teknek assets. Although it has not been clearly articulated in this appeal, the court presumes that the Trustee's argument that the bankruptcy court had jurisdiction to enter an injunction as to Electronics is the same as the position he has taken in Adversary Proceeding No. 06-412. In that proceeding, the Trustee has alleged that Teknek's fraudulent transfers, intended to divest Teknek of any assets, took the forms of monetary transfers to Kennett and Hamilton and transfers of tangible and intangible assets to Teknek-related entities controlled by Kennett and Hamilton. (06-ap-412 Docket Entry No. 63 ¶¶ 23-24.) The Trustee describes a scheme in which many of Teknek's assets—including accounts receivables and payables, fixed assets and liabilities, office furniture and other tangible assets, and customer lists—were transferred to Electronics (*id.* ¶¶ 26-29), and then from Electronics to Holdings (*id.* ¶ 30); he contends that the customer list is now being used by Teknek-related entities for which Holdings is the umbrella organization. (*Id.* ¶ 31.) In other words, the bankruptcy court has found that the scheme of fraudulent transfers included transfers to each of the judgment debtors. This suggests that the bankruptcy court ought to be given the opportunity to untangle the transfers and identify the assets that are properly part of the estate.

Indeed, the preliminary injunction order is based on a finding that Teknek transferred "all of its assets to Electronics, who then transferred the assets to various companies either owned or controlled by Hamilton and Kennett." (07-ap-583 Docket Entry No. 14 ¶ N.ii.) The order reads:

> M. On January 5, 2007, the District Court [for the Central District of California] entered an order (the "SDI Order") granting the SDI Motion [to add Hamilton, Kennett, and Holdings as defendant parties to the SDI Judgment].
>
> N. In the SDI Order, the District Court found, among other things that: . . . .
>
> ii. sometime during the period 2003-2004, either while the Patent Case was pending or following the entry of the SDI Judgment, the Debtor accomplished the transfer of all of its assets to Electronics, who then transferred the assets to various companies either owned or controlled by Hamilton and Kennett, including Holdings, Teknek America, LLC, Kehnam [sic], LLC and Tekena, LLC (collectively with Electronics, the "Teknek Affiliates"):[6]

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6. The Teknek Trustee admits that these factual statements in Judge Cox's order were taken "directly" from his avoidance

(Cont'd)

(*Id.* ¶¶ M-N.) In other words, the preliminary injunction order explicitly attributes these factual findings are explicitly attributed to Judge Carter.

Judge Carter had an opportunity to respond to the bankruptcy court's understanding of his factual findings. (*See* 00-cv-135 Docket Entry No. 563 at 7 n. 3.) Judge Carter cautioned that the bankruptcy court's order "disturbingly misrepresents" his findings of fact, and this court agrees. (*Id.*) First, Judge Carter never found that Teknek's assets were transferred from Teknek to Electronics and then to Holdings; he found, to the contrary, that both Teknek's and Electronics' assets were transferred *directly* to Holdings. (*Id.*) This is significant, because if Teknek's assets were transferred to Electronics rather than directly to Holdings, this would imply that the assets transferred to Holdings were all, originally, Teknek assets and that none were, originally, Electronics assets. (*Id.*) In other words, it would suggest that all of Holdings' assets came from Teknek. (*Id.*) This, however, is "patently false." (*Id.*)

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(Cont'd)

complaint. (Levey Br. at 21.) He contends before this court that these statements were intended as a recitation of that complaint rather than a characterization of Judge Carter's ruling. (*Id.*) But the clear language of the Order indicates otherwise (07-ap-583 Docket Entry No. 14 ¶ N), and this court rejects the Trustee's characterization.

*Appendix B*

What Judge Carter's Order actually finds is: "In 2004, Defendant Teknek LLC 'sold' all of its assets to Teknek Holdings. This transfer included the Teknek trademark. . . ." (00-cv-135 Docket Entry No. 486 at 3.) The Federal Circuit made the same finding of fact: "Teknek LLC did not become a subsidiary of Teknek Holdings, but in 2004, it 'sold' all of its assets to Teknek Holdings, including the Teknek trademark. There is no evidence to suggest that Teknek LLC received any compensation for the assets that it transferred to Teknek Holdings." *Sys. Div.*, 2007 WL 3151697, at *1.[7] In 2003, Electronics paid a £3.5 million dividend to Holdings in 2003 and a £1.5 million dividend to Holdings in 2004 but received nothing in exchange for either dividend. (00-cv-135 Docket Entry No. 486 at 2-3.) Electronics transferred its building to Holdings in 2003 and sold all of its assets to Holdings (though it is not clear when); Electronics received no check in exchange for the asset transfer. (*Id.*) The Federal Circuit made similar findings that Electronics paid dividends to Holdings, that Electronics transferred its assets and building to Holdings, and that there is no evidence that Electronics received any compensation in exchange for the asset transfers. *Sys. Div.*, 2007 WL 3151697, at *1. But there is no indication in either opinion that the Teknek assets passed through Electronics or that Electronics did not, originally, own the assets it transferred to Holdings.

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7. Judge Carter also points out that his Order makes clear that both Teknek and Electronics transferred assets to Holdings with actual intent to defraud SDI. (00-cv-135 Docket Entry No. 563 at 7 n. 3.)

*Appendix B*

Both parties presented factual evidence to the Central District of California and the Federal Circuit. Nevertheless, the Trustee now contests the version of events set forth by those courts. He focuses on the language of a Settlement Agreement, never actually adopted by the parties, to the effect that Teknek sold most of its assets to Electronics, and the statement of an SDI officer that "[t]o my knowledge, none of the assets of Teknek LLC were transferred directly to Teknek Holdings." (Levey Br. at 21-22; Korbonski Decl. ¶ 4, Ex. 37 to Levey Br.) This is not sufficient to persuade the court to revisit the issue. In light of the clear findings by both courts to consider the issue, the court is not inclined to entertain conflicting, unsubstantiated allegations of fact. Absent any real evidence to contradict prior findings of fact, the court will not disturb them here. Teknek's fraudulent transfers did not involve Electronics, and there is thus no basis for extending the stay to Electronics.

Judge Carter's findings likewise underscore that any success SDI may have in collecting on its patent infringement judgment would not extinguish claims the Trustee has against Kennett and Hamilton. Judge Carter's decision that Kennett and Hamilton were alter egos of Teknek and Electronics was not premised on any transfers to the individuals. Instead, Judge Carter noted that "The assets of both Defendants [Teknek and Electronics] were transferred to Teknek Holdings. As a result, both Defendants are now insolvent." (00-cv-135 Docket Entry No. 486 at 2.) In other words, the facts underlying any claims the Trustee has against those

individuals are wholly irrelevant to the collection proceedings. In addition, there has been no showing by the parties or finding by the court that Kennett and/or Hamilton would be incapable of satisfying their debts to both SDI and, if any, to Teknek. Therefore, the bankruptcy court had no jurisdiction to enjoin collection proceedings against these two individuals.

### c. Ability to Satisfy the Judgment

That the judgment debtors may be liable to both SDI and Teknek raises the question of whether the judgment debtors will be able to satisfy its potential debts to both SDI and the Teknek estate. If not, the Trustee might have a real claim that collection by SDI would affect the Teknek estate. This court is unaware, however, of any argument or evidence that the judgment debtors lack the resources to satisfy both their debt to SDI and their alleged debt to the estate. In the absence of such a finding, SDI's efforts to collect on its patent infringement judgment have no impact on the bankruptcy proceedings. Moreover, the court is not certain that a bankruptcy court may stay a district court's proceedings simply to ensure that the estate at issue is able to collect on any claims it has brought. *Cf. In re Combustion Eng'g*, 391 F.3d at 225 (section 105 jurisdiction cannot be used to create a "bigger pot" of assets for all claimants in the absence of statutory bankruptcy jurisdiction). In addition, as noted above, in this case the Trustee has brought no claim directly against Holdings, so it would make little sense to declare administration of the bankruptcy estate "related to" collection of the patent infringement judgment.

### d. Equities

Moreover, in the circumstances presented here, the equities counsel against the bankruptcy court's exercise of jurisdiction to enjoin the patent proceedings. The judgment debtors have engaged in complicated machinations to avoid satisfying their debt to SDI. As discussed above, contempt sanctions have been imposed as a result, and both the Central District of California and Federal Circuit held that the infringer's behavior merited adding the alter egos it used to facilitate its fraudulent activity as judgment debtors. Under similar circumstances, the Second Circuit has held:

> While we decline to define under what circumstances, if any, a bankruptcy court may properly exercise § 105 jurisdiction to issue a stay with respect to non-bankrupt co-defendants, it is clear that any such jurisdiction cannot extend to efforts made in bad faith by non-bankrupt co-defendants in order to escape from the liability imposed by an adverse district court judgment. And here the circumstances plainly attest to the defendants' bad faith. As the district court correctly noted, "the record makes abundantly clear that the defendants are engaging in frivolous and vexatious litigation, simultaneously filing pleadings and papers in numerous courts with the sole purpose to delay and frustrate the ability of Teachers to

> execute judgment with respect to the non-debtor individual defendants . . ."

*Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65-6 (2d Cir.1986)

In *Teachers Insurance*, the plaintiffs prevailed on a breach of contract claim against a partnership and its three general partners in the Southern District of New York. *Id.* at 62-3. After the judgment was signed, the partnership filed for Chapter 11 bankruptcy in the Eastern District of California, and the bankruptcy court issued a temporary restraining order preventing plaintiffs from enforcing their judgment against the debtor and its three non-debtor general partners. *Id.* The debtor's trustee, whom the general partners had nominated, then sought to remove the breach of contract case to the Eastern District of California; the general partners appealed the judgment of the Southern District of New York to the Bankruptcy Appellate Panel of the Ninth Circuit (though it is not clear on what basis), to the Ninth Circuit (again, it is not clear how), and then to the Second Circuit. *Id.* at 63. The Southern District of New York granted plaintiffs' motion to enjoin the partners from appealing its decision to any court other than the Second Circuit and granted other relief. *Id.* The general partners appealed this injunction, as well as the breach of contract judgment against them. *Id.* Here, as in *Teachers Insurance*, the debtor and affiliated entities have engaged in complicated machinations to avoid paying a judgment entered against them. Bankruptcy procedures

cannot be used to achieve this end, and the bankruptcy court thus lacked jurisdiction.

The Trustee's attempts to distinguish *Teachers Insurance* are unavailing. The Trustee notes, first, that the injunction at issue here is being sought by an independent trustee for the benefit of the estate rather than the wrongdoers. (Levey Br. at 17.) But it appears to the court that the injunction benefits the wrongdoers and not the estate, as the estate's interest in recovering wrongful payments is not jeopardized if the injunction is lifted. The Trustee also asserts that the wrongdoers are attempting to pay the judgment rather than avoid it (*id.*), but that characterization is inconsistent with the record, including Judge Carter's ruling that assets were fraudulently transferred to avoid payment of that debt. Although there have been settlement efforts, they were ultimately unsuccessful and cannot, in any event, vest the bankruptcy court with jurisdiction it does not otherwise have. If anything, the objection to the bankruptcy court's jurisdiction is even stronger here than it was in *Teachers Insurance*, where the debtor had filed a Chapter 11 proceeding, requiring the court to consider the debtors' possible rehabilitation. 803 F.2d at 65. In a Chapter 7 bankruptcy case such as this one, rehabilitation is not at issue and the bankruptcy court's related-to jurisdiction should be more limited as a result. *Cf. Celotex*, 514 U.S. at 310 (1995). Thus, as the bankruptcy court failed to articulate how collection proceedings against Holdings in the patent infringement case would affect the judgment debtor's estate, it lacked jurisdiction to enjoin proceedings against Holdings.

### C. Grant of Injunctive Relief

Even if the bankruptcy court had jurisdiction to enjoin attempts to collect from Holdings, Kennett, and Hamilton, the question of whether injunctive relief is appropriate would remain. A section 105 preliminary injunction should be granted where a party demonstrates a likelihood of success on the merits of its claim that proceedings will defeat or impair the bankruptcy court's jurisdiction and that the injunction will not harm the public interest. *Fisher*, 155 F.3d at 882. As explained below, the court concludes that neither element has been met in this case.

#### 1. Likelihood of Success on the Merits

The bankruptcy court concluded that the collection proceedings in the Central District of California were likely to impair the bankruptcy estate and the bankruptcy court's jurisdiction. In support of this finding, Judge Cox held that the Teknek Trustee was likely to succeed on the merits because the Trustee is the appropriate litigant to pursue the debtor's alter ego claims on behalf of its debtors. (07-ap-583 Docket Entry No. 14 ¶ Y.) The bankruptcy court also concluded that SDI's purported collection claims are "claims of the Estate," and that there are significantly overlapping issues between SDI's collection claims and the Trustee's claims in the adversary proceedings. (*Id.* ¶¶ Z-AA.) In addition, the bankruptcy court found that the injunction would advance the public interest. (*Id.* ¶¶ BB-CC.) As explained here, this court does not agree that the Trustee has satisfied this two-part test.

First, the court can discern no reason why SDI's recovery of its patent infringement judgment would preclude the Teknek Trustee from recovering the value of the allegedly fraudulent transfers. Without any evidentiary support, the court cannot conclude that Holdings is incapable of satisfying its debts to both SDI and Teknek, and satisfaction of one will not extinguish the other. To the extent the satisfaction of all of Holdings' outstanding debts does become a problem, the proceedings may be disaggregated. "In cases involving multiple parties or multiple claims, the courts have 'disaggregated' the proceedings so that claims against co-defendants who are not under the protection of the bankruptcy court may go forward, as well as claims for which stay is unnecessary to protect the debtor." *Seiko Epson*, 190 F.3d at 1364. In *Seiko Epson*, the defendant was accused of a number of wrongs, including patent infringement. 190 F.3d at 1362. The district court issued an injunction on the patent infringement issue, which the Federal Circuit affirmed. *Id.* Several months later, and after plaintiffs sought to add counts of infringement pertaining to three additional patents, the district court declared four patents unenforceable. *Id.* As a result, it refused to expand the injunction to one of those patents and dissolved the portion of the injunction that related to the other three unenforceable patents. *Id.* Plaintiffs appealed the issues of patent unenforceability and invalidity to the Federal Circuit, while defendants appealed orders holding them in contempt for violating the preliminary injunction. *Id.* at 1363. Four days after oral arguments were held, defendant Nu-Kote International, Inc. filed for Chapter 11 bankruptcy. *Id.*

The parties then disputed whether the automatic stay would extend to defendant Pelikan Produktions, A.G., a non-debtor. *Id.* The Federal Circuit held that "in all events Pelikan is not entitled to the benefits" of the automatic stay. *Id.* at 1364.[8] While the Trustee attempts to distinguish *Seiko* on the ground that this case involves property of the bankruptcy estate (Levey Br. at 17-18), the court finds that SDI's claims are patent infringement, not alter ego, claims and therefore not property of the Teknek estate.

At least one court in this district has affirmed that disaggregation is proper in certain cases:

> All proceedings in a single case are not lumped together for purposes of automatic stay analysis. . . . Within a single case, some actions may be stayed, others not. Multiple claim and multiple party litigation must be disaggregated so that particular claims, counterclaims, cross-claims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay.

*In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 975 (N.D.Ill.1992) (Easterbrook, J.) (citation omitted). Thus, the court held

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8. The court also held that the debtor may not violate previously-issued orders merely because appeal from those orders is stayed. *Seiko Epson*, 190 F.3d at 1364. Teknek is cautioned that this applies to its own future activities.

that the patent litigation against the non-debtor co-defendant would go forward without the debtor. *Id.* at 977. *See also Snavely v. Miller (In re Miller)*, 397 F.3d 726, 731 (9th Cir.2005) (same). Although *Mahurkar* and *Snavely* both consider automatic stays rather than a stay entered pursuant to section 105, the logic is compelling in this case. The non-debtors are not entitled to the benefits of the Bankruptcy Code, as they are not in bankruptcy proceedings. In addition, the claims against them can be disaggregated from the claims against the debtor. As such, there is no reason to enjoin proceedings against the non-debtors.

With regard to the Trustee's likelihood of success on the merits, it is also notable to consider the extraordinary nature of the remedy sought in this case. Essentially, the Bankruptcy Court has enjoined collection proceedings against the debtor and related non-debtors, including staying pending contempt proceedings. This is not an exercise of jurisdiction that should be lightly taken, as *Mahurkar* makes clear. In *Mahurkar*, the plaintiff had patent infringement claims against two parties. 140 B.R. at 970. The patent dispute was before the District Court for the Northern District of Illinois, while the bankruptcy filed by one of the two patent infringement defendants was before the Bankruptcy Court for the District of Delaware. *Id.* The bankruptcy court enjoined the patent proceedings while a hearing was scheduled before Judge Easterbrook. *Id.* at 972. In other words, the bankruptcy court effectively "instructed counsel to remain silent during the hearing scheduled in this court." *Id.*

"On learning of this preposterous order," the Northern District entered an order making clear that the bankruptcy court's attempt to override an order he had previously issued was "ineffectual." *Mahurkar*, 140 B.R. at 972. The court therefore required the parties to appear at his hearing and participate in oral arguments. *Id.* As Judge Easterbrook, sitting by designation, found:

> For one federal court to issue an injunction forbidding litigation in another is extraordinary, given principles of comity among coordinate tribunals. *E.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952); *cf. Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). For a bankruptcy judge to issue an injunction with the effect of preempting resolution of a pending motion in a district court is unheard-of. Well, perhaps not *un*-heard of. I found one case in which a bankruptcy court did so, and the district judge brushed the order aside in derision, treating the order as so patently unauthorized that no further explanation was warranted. *Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*, 84 Bankr.638, 644 (D.S.D.1988).

*Id.* at 974. Ultimately, the court ruled that the "patent litigation is not a core proceeding by any stretch of the imagination, and I think it beyond cavil that I have authority to decide, for example, whether [plaintiff] is entitled to take discovery from former [debtor]

employees that may be relevant to the action against [the non-debtor co-defendant.]" *Id.* at 974. *See also In re Receivership Estate of Indian Motorcycle Mfg.*, Civil Action No. 95-Z-777, 2002 WL 507543, at *3 (D.Colo. Feb.28, 2002) (urging bankruptcy judge to reconsider as improper order enjoining and restraining receiver from filing any motions or papers with the district court and ordering receiver to bring before the district court matters for consideration and resolution).

Here, as in *Mahurkar*, the bankruptcy court has attempted to preempt resolution of pending motions (here, the contempt proceedings) in a district court. No extraordinary circumstances are present that would justify this exercise of jurisdiction, if jurisdiction does in fact exist. That *Mahurkar* involved an automatic stay rather than a section 105 injunction does not in any way diminish the impact of its ruling on this case. As the Trustee points out, the *Mahurkar* court drew a distinction between conduct that would affect the debtor's estate and conduct that would not. (Levey Br. at 19.) Collection proceedings against non-debtors fall on the latter side of this line. Following the *Mahurkar* rationale, this court concludes that the Trustee has no substantial likelihood of prevailing on the merits and obtaining a permanent injunction that would bar SDI from collecting its judgment against the non-debtor.

*Appendix B*

**2. Public Interest**

Having discussed at length the extreme remedy sought here, and the impact the injunction would have on comity between the bankruptcy courts and district courts, the court concludes that it does not serve the public interest. The debtor in this case has avoided paying a judgment against it by setting up a new entity and transferring its assets to the entity, controlled by the same people who control the debtor. In so doing, the debtor rendered itself insolvent and payment of its debt impossible. Post-transfer, the debtor filed for bankruptcy, disclosing that 99% of its liabilities were owed to the infringee. When the new entity, controlled by the same people who control the debtor, was made directly liable for the original debt, thereby thwarting the debtor's attempts to escape liability, the debtor then changed tactics. The debtor now argued that it, rather than the infringee, had the right to recoup the assets that it fraudulently transferred. In other words, the debtor here seeks to shield itself from the consequences of its own wrongful conduct by invoking an alter ego claim. *See Lumpkin v. Envirodyne Indus.*, 933 F.2d 449, 460 (7th Cir.1991) ("The alter ego doctrine is a sword, not a shield, the basis for a cause of action, not a defense."). That the Teknek Trustee, rather than Kennett or Hamilton, now controls Teknek's assets does not disturb the fundamental inequity of permitting Teknek to evade its liability and force SDI to jump through hoops to collect on its judgment.

*Appendix B*

## CONCLUSION

The preliminary injunction entered by the bankruptcy court is hereby vacated.

## APPENDIX C — PRELIMINARY INJUNCTION ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 29, 2007

**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Chapter 7
Case No. 05-27545
Hon. Jacqueline P. Cox

Adv. Proc. No. 07-0583

In re:

TEKNEK, LLC,

Debtors.

---

PHILLIP D. LEVEY,

Plaintiff,

v.

SYSTEMS DIVISION, INC.,

Defendant.

**PRELIMINARY INJUNCTION ORDER**

This adversary proceeding came before the Court on the motion (the "Motion") filed by Phillip D. Levey,

chapter 7 trustee and plaintiff herein, (the "Levey"),[1] pursuant to §§ 105(a) and 362 of the Bankruptcy Code and Fed. R. Bankr. P. 7065, for the entry of an order enforcing the automatic stay and preliminarily enjoining defendant Systems Division, Inc. ("SDI") from taking further action to collect the SDI Judgment. The Court has considered the Motion and the Verified Statement of Phillip D. Levey filed in its support, the arguments of counsel and other evidence submitted. Based on the foregoing, the Court makes the following Findings of Fact, Conclusions of Law and other determinations:

A. This action is a civil proceeding arising under the Bankruptcy Code, or arising in or related to a case under the Bankruptcy Code within the meaning of title 28, United States Code, section 1334(b).

B. The matters asserted in this proceeding are core proceedings pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O).

C. This Court has jurisdiction over SDI, by virtue of its appearance as a creditor in the Debtor's bankruptcy case (the "Case").

D. On July 12, 2005 (the "Petition Date"), the Debtor commenced the Case by filing a voluntary petition for relief pursuant to the provisions of chapter 7 of title 11, United States Code (the "Bankruptcy Code"). At that

1. Terms not defined herein shall have the meaning ascribed to them in the motion.

time, Lawrence Fisher ("Fisher") was appointed as chapter 7 trustee to administer the Debtor's estate (the "Estate").

E. On or about May 31, 2006, Fisher resigned as chapter 7 trustee and Levey was appointed as Fisher's successor (hereinafter, Fisher and Levey shall be interchangeably referred to as "Trustee").

F. On June 22, 2007, the Trustee commenced this adversary proceeding by filing a complaint (the "Trustee Complaint") for injunctive and other relief in this Court pursuant to Federal Rule of Bankruptcy Procedure 7001, against Systems Division, Inc. ("SDI").

G. In or about February 2000, SDI initiated a patent infringement suit against the Debtor and a non-debtor affiliate, Teknek Electronics Ltd. ("Electronics") in the United States District Court for the Central District of California (the "District Court") in a case styled as *Systems Division, Inc. v. Teknek Electronics, et al.*, Case No. SA CV 00-135 (the "Patent Case").

H. At that time the Patent Case was filed, Electronics was owned by Sheila Hamilton ("Hamilton") and Jonathon Kennett ("Kennett"), the principals of the Debtor.

I. On July 12, 2004, SDI obtained a jury verdict against the Debtor in Patent Case and on August 18, 2004, the District Court entered a judgment in favor of SDI and against the Debtor in the approximate amount of $3.7 million (the "SDI Judgment").

*Appendix C*

J. On or about June 15, 2005, SDI filed a motion under seal before the District Court seeking to add Hamilton, Kennett and Holdings as defendant parties to the SDI Judgment pursuant to Federal Rule of Civil Procedure 69(a) on the theory that each were alter egos of the Debtor and Electronics and that they fraudulently transferred the Debtor's assets to Holdings, thereby bankrupting the Debtor and Electronics and preventing SDI from recovering its judgment (the "SDI Motion").

K. On or about August 1, 2005, the District Court stayed further proceedings in the Patent Case due to the Debtor's bankruptcy and Electronic's insolvency.

L. On September 14, 2006, SDI submitted an *ex parte* application (the "*Ex Parte* Motion") in the District Court asking that the District Court's stay of proceedings in the Patent Case be lifted and that the SDI Motion be set for hearing, which the District Court granted.

M. On January 5, 2007, the District Court entered an order. (the "SDI Order") granting the SDI Motion.

N. In the SDI Order, the District Court found, among other things that:

i. in or about April 2000, Hamilton and Kennett formed Teknek Holdings, Ltd., ("Holdings") a Scottish company;

ii. sometime during the period 2003-2004, either while the Patent Case was pending or following the entry of the SDI Judgment, the Debtor accomplished the transfer of all of its assets to Electronics, who then transferred the assets to various companies either owned or controlled by Hamilton and Kennett, including Holdings, Teknek America, LLC, Kehnam, LLC and Tekena, LLC (collectively with Electronics, the "Teknek Affiliates");

iii. Hamilton and Kennett were the alter ego's of the Debtor and Electronics;

iv. Hamilton and Kennett caused the transfer of the Debtor's assets with the actual intent to defraud SDI;

v. that the assets were transferred for no consideration; and

vi. that such transfers were intended to result in the Debtor's insolvency.

O. The SDI Order, including the District Court's findings, has since been appealed by Hamilton and Kennett and such appeal is currently pending before the Federal Circuit Court of Appeals.

P. On January 22, 2007, SDI filed a Certification of Foreign Judgment Action (the "Registration Action") in the United States District Court for the Northern

District of Illinois in furtherance of its attempt to collect the SDI Judgment against Hamilton, Kennett and the Teknek Affiliates. On motion by counsel to Hamilton and Kennett the District Court dismissed the Registration Action.

Q. On November 22, 2005 this Court approved the retention of Freeborn & Peters, as special counsel to the Fisher for the purpose of investigating and pursuing avoidance claims and other causes of action arising in connection with the Debtor's prepetition transfer of assets.

R. Freeborn & Peters was selected as special counsel to the Trustee specifically because of its preexisting knowledge of the Debtor's prepetition transfers obtained as a result of its ongoing representation of SDI.

S. On January 19, 2006, after conducting an investigation of the Debtor's prepetition activities pursuant to Fed. R. Bankr. P. 2004 in the context of the Case, Freeborn & Peters initiated an adversary proceeding on behalf of the Trustee styled as *Fisher v. Hamilton et al.*, Adv. No. 06-0412 (the "Avoidance Action") by filing a complaint (the "Avoidance Complaint") against Hamilton, Kennett, certain of the Teknek Affiliates and other related individuals seeking, among other things, to: (a) avoid fraudulent transfers made by the Debtor to Hamilton, Kennett and certain other related parties; (b) pierce the corporate veil of the Debtor and hold Hamilton and Kennett personally

liable for the Debtors' obligations; and (c) recover wrongful distributions made by the Debtor to Hamilton prior to the Petition Date.

T. The Trustee's efforts and the efforts of Freeborn & Peters in investigating, preparing, filing, and litigating the Avoidance Complaint, to date, have resulted in administrative claims in excess of $300,000.

U. On May 9, 2007, Hamilton and Kennett filed a Motion to Stay Proceeding for 90 Days to Allow for Full Payment of Judgment (the "Stay Motion") in the Avoidance Action wherein Hamilton and Kennett advised the Court that "the instant adversary proceeding is based solely on the $3 million dollar judgment that SDI obtained in California" and as a result of the defendants in the Patent Case having agreed to pay the judgment to SDI, "this Adversary Proceeding will be completed in the near future." The Stay Motion was denied by this Court on May 15, 2007.

V. Pursuant to § 105 of the Bankruptcy Code, a bankruptcy court can enjoin proceedings in other courts when it is satisfied that such claims or proceedings would adversely impact a bankruptcy estate or impair the bankruptcy court's jurisdiction of the case before it. *Fisher v. Apostolou (In re Lakestates Commodities, Inc.)*, 155 F.3d. 876, 882 (7th Cir. 1998).

W. "A party seeking a preliminary injunction is required to demonstrate a likelihood of success on the merits, that it has no adequate remedy at law, and that

it will suffer irreparable harm if the injunction is not granted." *El Puerto de Liverpool S.A. de C. V v. Servi Mundo Llantero, U.S.A., Inc. (In re Kmart Corp.)*, 285 B.R. 679, 692 (Bankr. N.D. Ill. 2001) *(citing Ty, Inc.. v. The Jones Group*, 237 F.3d 891, 895 (7th Cir. 2001)).

X. However, in a bankruptcy case the movant need not demonstrate the existence of an inadequate remedy at law or irreparable harm to obtain an injunction. *Fisher*, 155 F.3d at 881; *In re L & S Indus., Inc.*, 989 F.2d 929, 931 (7th Cir. 1993). The bankruptcy court's ability to issue a preliminary injunction without such a showing is based on section 105(a) of the Bankruptcy Code which provides "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," such as section 542(b). This provision provides the bankruptcy court broad equitable powers to preserve its own jurisdiction. *L & S* at 931 (finding that a bankruptcy court may enjoin proceeding is other courts which would defeat or impair its jurisdiction.). Thus, a movant seeking a preliminary injunction pursuant to section 105(a) of the Bankruptcy Code and Rule 7065 of the Bankruptcy Rules must only show likelihood of success on the merits and that the injunction will not harm, the public interest. *Fisher* 155 F.3d at 881.

**The Trustee Is Likely To Succeed on the Merits**

Y. The Trustee of a chapter 7 proceeding has the duty to marshal all available property, reducing it to money, distributing it to creditors, and closing up the

estate. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F. 2d 1339, 1342 (7th Cir. 1987). In that regard, "the commencement of bankruptcy gives the trustee the right to pursue fraudulently conveyed assets to the exclusion of all creditors," *Klingman v. Levinson (In re Levinson)* 158 B.R. 109, 133 (N.D. Ill. 1993). Moreover, the Trustee "is the proper party to pursue alter ego claims on behalf or all creditors" of the Debtor's estate. *Koch Refining* 831 F. 2d at 1345; *see also CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378 (9th Cir. BAP 1997).

Z. SDI's purported claims under the SDI Motion are claims of the Estate. Moreover, the District Court's determination that Hamilton, Kennett and Holdings could be properly added as defendants to the SDI Judgment and pursued for collection of the same was based on SDI's claims that (a) Hamilton and Kennett were the alter ego's of the Debtor; (b) that Hamilton and Kennett caused the transfer of the Debtor's assets with the actual intent to defraud SDI; (c) that the assets were transferred for no consideration and (d) that such transfers were intended to result in the Debtor's insolvency.

AA. In light of (a) the Trustee's right to pursue fraudulent transfer claims and alter ego/piercing the corporate veil claims on behalf of the Estate to the exclusion of individual creditors and (b) the significant overlapping issues between SDI's claims in the Patent Case and the Trustee's claims in the Avoidance Action, the Trustee is likely to succeed on the merits in enforcing

the stay against SDI and permanently enjoining SDI from collecting the SDI judgment.

**The Injunction Will Advance The Public Interest**

BB. SDI's attempts to collect the SDI Judgment are interfering with the Trustee's ability to administer the Estate pursuant to his obligations under the Bankruptcy Code.

CC. Granting a preliminary injunction as requested by the Trustee will advance the public interest by (a) facilitating Trustee's ability to expeditiously administer the Estate and (b) serving to enforce the automatic stay provisions of § 362 of the bankruptcy code thereby preventing the SDI from collecting the SDI judgment for its sole benefit and to the detriment the Estate's creditors, including administrative claimants.

DD. The Trustee has demonstrated good cause for preliminary injunctive relief pursuant to §§ 105 and 362 of the Bankruptcy Code because (a) the Trustee has a substantial likelihood of success on the merits under § 362 and (b) the preliminary injunction will serve to protect the Estate's interests and will not harm any public interest.

Based on the foregoing, it is **ORDERED, ADJUDGED AND DECREED AS FOLLOWS**:

1. The Motion is granted.

2. SDI, its attorneys and other agents are hereby enjoined and prohibited from prosecuting, either directly or indirectly, or collecting upon any claims or taking any action against: (a) the Debtor; (b) Hamilton; (c) Kennett; and (d) the Teknek Affiliates with respect to the SDI Judgment.

3. This injunction shall be effective through and until July 27, 2007, unless further extended by order of this Court.

4. The Trustee shall provide notice of this Preliminary Injunction Order to the District Court.

5. This Court shall retain jurisdiction to enforce, interpret, clarify, or modify this Preliminary Injunction Order and to provide such supplemental interim relief as may be necessary or appropriate.

Dated: June 29, 2007

ENTER:

s/ Jacqueline P. Cox
United States Bankruptcy Judge

## APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 28, 2007

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

Chapter: 7

Case Number: 05-bk-27545

Adversary Number: 07-ap-0583

Judge: Jacqueline P. Cox

In re:

TEKNEK, LLC

Debtor.

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PHILLIP D. LEVEY

Plaintiff,

v.

SYSTEMS DIVISION, INC.

Defendant.

**ORDER ON MOTION TO EXTEND PRELIMINARY INJUNCTION ORDER**

Pending before the court is the Plaintiff's "Motion to Extend Preliminary Injunction Order" (07-ap-0583,

Doc. 67). The Plaintiff seeks to extend the "Order Continuing Motion by SDI to Modify Preliminary Injunction" (07-ap-0583, Doc. 24), which enjoined and prohibited SDI, its attorneys, agents, and representatives from prosecuting claims against, or collecting on account of any such claims, the Debtor, Sheila Hamilton, Jonathan Kennett and entities commonly known as the Teknek parties through and until 11:59 p.m. on August 28, 2007. Also pending before this court is a motion seeking approval to compromise claims the Trustee has against Ms. Hamilton, Mr. Kennett, Teknek Holdings and certain other parties involved in adversary proceeding 06-ap-0412 (05-bk-27545, Doc. 162). The Plaintiff seeks a continuation of the preliminary injunction order until the court rules on the motion to compromise.[1]

On June 22, 2007, the Trustee commenced an adversary proceeding against Systems Division, Inc. ("SDI" or "Defendant") that seeks (1) Damages for Violation of the Automatic Stay; (2) Injunctive Relief; (3) Turnover of Judgment Proceeds; (4) Avoidance of Postpetition Transfers Pursuant to § 549; (5) Recovery of Avoided Postpetition Transfers Pursuant to § 550. Additionally, a motion for preliminary injunction was filed on June 22, 2007 and scheduled for hearing on June 26,

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1. A scheduling order was signed on August 23, 2007 providing that any response to the motion to compromise shall be filed on or before August 31, 2007 (05-bk-27545, Doc. 164). Any response from the Trustee must be filed by September 14, 2007. The motion is presently set for a continued status hearing on September 19, 2007 at 10:30 am.

2007 (07-ap-0583; Doc. 3). Notice of the motion was made by electronic mail on June 22, 2007 to SDI's counsel, Attorney Neil H. Levin located in Chicago, Illinois and Attorney Edward F. O'Connor located in Irvine, California. SDI's registered agent in the state of Illinois was served by facsimile.

Through its attorney, SDI filed a response opposing the motion on June 25, 2007 (07-ap-0583, Doc. 7). Counsel representing SDI also appeared at the hearing on June 26, 2007. At the hearing's conclusion, the court granted the motion on June 26, 2007 and signed an order on June 29, 2007 detailing its findings of facts and conclusions of law (07-ap-0583; Doc. 13 & 14). The order provided that the injunction would be effective through and until July 27, 2007.

On July 10, 2007, SDI filed a motion seeking modification of the June 29, 2007 Injunction Order (07-ap-0583; Doc. 15). A hearing on the motion was held July 12, 2007. The court signed an order on July 13, 2007 continuing SDI's motion and the preliminary injunction to August 28, 2007 at 11:59 p.m (07-ap-0583; Doc. 24).[2]

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2. Pursuant to statements made in court by SDI's counsel during a hearing held on August 9, 2007 in a separate matter involving these parties, the court signed an order on August 10, 2007 that states that SDI's motion to modify the preliminary injunction order is deemed withdrawn, without prejudice, and the continued hearing scheduled on August 28, 2007 is adjoined *sine die*. (07-ap-0583; Doc. 60).

*Appendix D*

On August 28, 2007, the court held a hearing on the Plaintiff's motion to extend the preliminary injunction order and heard oral argument from the Plaintiff and the Defendant.[3]

SDI opposes the motion and argues that the Trustee has not presented any evidence other than an conclusory declaration stating, without any explanation, that the Trustee's ability to collect its judgment is being interfered with by SDI's attempt to collect its judgment from third parties. Relying in part on the Seventh Circuit's decisions in *In re L&S Indus.*, 989 F.2d 929 (7th Cir. 1993); *Carmichael v. Basler Turbo Conversions, Inc.*, 952 F.2d 1398 (7th Cir. 1992)(UNPUBLISH1D) and *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37 (7th Cir.. 1982), SDI argues that the June 29, 2007 preliminary injunction order was fundamentally flawed, as a matter of law, in that it did not meet the basic requirements that there must be a factual basis for the court's conclusion that the Trustee seemed likely to succeed on the merits of its complaint. SDI additionally maintains that this court lacks subject matter jurisdiction to interfere with SDI's enforcement of its judgment in excess of $4,000,000.00 against Teknek Holdings, Ms Hamilton and Mr. Kennett.[4]

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3. Prior to the hearing, both the Plaintiff and SDI filed replies and responses in support of their respective positions (07-ap-0583; Doc.

4. SDI further argues that this court never addressed the allegation made in its motion to dismiss that this court lacks

(Cont'd)

In support of his motion, the Plaintiff relies, in part, on the Seventh Circuit decisions in *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir. 1998) and *Koch Refining v. Farmers Union Cent. Exch.*, 831 F.2d 1339 (7th Cir. 1987) along with District Court Judge Grady's decision in *Wayne Film Sys. Corp.* v, *Film Recovery Sys.*, 64 B.R. 45 (N.D. Ill. 1986) for his position that the bankruptcy trustee, as the creditor body's representative, is the proper party to bring an alter ego claim against third parties because such claims are property of the estate.

**PRELIMINARY 1NJ UNCTION**

In the Seventh Circuit, a party seeking a preliminary injunction must show "that it is reasonably likely to succeed on the merits, it is suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted, there is no adequate remedy at law, and an injunction would not harm the public interest." *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). *See also Lambert v. Buss*, __ F.3d __, 2007 WL 2265143 *5 (7th Cir. Aug. 9, 2007); *Incredible Tech., Inc. v. Virtual Tech., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005). Once these requirements are met, the court must balance the degree of irreparable harm to the

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(Cont'd)

subject matter jurisdiction. The court signed an order on August 17, 2007 denying SDI's motion to dismiss, based in part on this court's conclusion that it has jurisdiction over monies collected from Teknek affiliates, Mr. Kennett and Ms. Hamilton if such monies are found to be property of the estate (07-ap-0583; Doc. 63 at p. 3).

plaintiff against the harm that the defendant will suffer if the injunction is granted. See *Walker*, 453 F.3d at 859.

At the close of the June 26, 2007 hearing on the original motion for a preliminary injunction, this court made several findings or facts and conclusions of law with respect to whether the Trustee is likely to succeed on the merits of his complaint and whether the injunction will advance the public interest. *See* 07-ap-0583; Doc. 14 at p.6-8. Included in these were findings based on *Koch Refining*, 831 F.2d at 1345, that the Trustee is the proper party to pursue alter ego and piercing the corporate veil claims on behalf of the all creditors and that "SDI's purported claims . . . are claims of the Estate." *See* 07-ap-0583; Doc. 14 at p. 6-8, §§ *Y* & *Z*. The court further found that granting the preliminary injunction would advance the public interest by facilitating the Trustee's ability to expeditiously administer the estate and serve to enforce the automatic stay provision.

SDI has alleged that there is no factual basis for the June preliminary injunction and the Trustee's requested extension. Note the factual findings in the June Order. An additional fact for the court's consideration is that there is a pending motion to settle the Trustee's claims against the same Defendants that SDI is pursing in the California litigation.

Moreover, SDI never appealed the June 29, 2007 order granting the first preliminary injunction. SDI also agreed to the first extension of the preliminary

injunction to August 28, 2007. There are no material changes to either the facts or the circumstances that surrounded the first motion for a preliminary injunction that would cause the court not to extend the preliminary injunction order to and through the time the Court rules on the Trustee's pending motions,

The court overrules SDI's objection to the Plaintiff's motion to extend the preliminary injunction order. The preliminary injunction is extended to and through November 27, 2007 at 11:59 p.m.

The court denies SDI's assertion that it did not consider its June 25, 2007 pleading opposing the original motion for a preliminary injunction. That document was considered before the June 29, 2007 order was entered.

**Dated: August 28, 2007**

**ENTERED:**

**s/ Jacqueline P. Cox**
**Jacqueline P. Cox**
**United States Bankruptcy Judge**

## APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED OCTOBER 2, 2007

**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Chapter: 7

Case No. 05-27545

Hon. Jacqueline P. Cox

Adv. Proc. No. 07-0583

In re:

TEKNEK, LLC,

Debtor.

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PHILLIP D. LEVEY, not individually but solely as chapter 7 trustee for the estate of Teknek, LLC,

Plaintiff,

v.

SYSTEMS DIVISION, INC.

Defendant.

*Appendix E*

## ORDER ON TRUSTEE'S MOTION TO CLARIFY AND ENFORCE THIS COURT'S JUNE 29, 2007 PRELIMINARY INJUNCTION ORDER

This adversary proceeding came before the court on October 1, 2007 for an adjourned hearing[1] on the plaintiff-Trustee's Motion to Clarify and Enforce This Court's June 29, 2007 Preliminary Injunction Order (the "Injunction"). The Injunction has been served on defendant System Divisions, Inc. ("SDI") and has been extended through November 28, 2007. SDI has filed a response in opposition to the motion and the court has considered the Motion, SDI's response, the arguments of counsel and the record in the chapter 7 case and in this adversary proceeding. Based on the foregoing, the Court makes the following Findings of Fact, Conclusions of Law and other determinations:

A. Due and proper notice of the hearing on the Motion has been given to SDI and all other parties in interest.

B. The court has jurisdiction to hear and determine the Motion pursuant to 28 U.S.C. §§ 1334(b) and 1334(e). *In re Gruntz*, 202 F.3d 1074, 1080-81 (9th Cir. 2000) (*en banc*); *Chao v. Hosp. Staffing Svcs.*, 270 F.3d 374, 383-84 (6th Cir. 2002). *See also In re US. Brass Corp.*,

1. The Trustee's motion (the "Motion") was filed on September 10, 2007 and initially presented on September 12, 2007. The Motion was continued to September 25, 2007 and then to October 1, 2007 to enable SDI to file a response and engage in oral argument on the Motion.

110 F.3d 1261, 1269 (7th Cir. 1997); *In re White*, 851 F.2d 170, 173 (6th Cir. 1988); *In re Modern Boats, Inc.*, 775 F.2d 619, 620 (5th Cir. 1985).

C. This is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A), (C) and (O).

D. On July 20, 2005, SDI appeared in the Debtor's bankruptcy case (the "Case") through its counsel, Freeborn & Peters LLP and has since filed a claim against the Debtor in the liquidated amount of $3,823,564.90 (the "SDI Claim"). The SDI Claim is substantially based on a judgment (the "SDI Judgment") SDI obtained against the Debtor and one of its affiliates, Teknek Electronics, Ltd. ("Electronics") in Case No. SA CV 00-135 DOC (ANx) pending before the Honorable David O. Carter, District Court Judge, entitled "Systems Division, Inc. v. Teknek Electronics, Ltd. *et al.*," (the "Patent Case") in the United States District Court for the Central District of California (the "California District Court").

E. At SDI's urging, the Trustee has employed Freeborn & Peters as his special counsel to investigate and pursue various causes of action against the Debtor's former affiliates and certain alleged successors in interest (the "Teknek Affiliates").

F. SDI has until now been satisfied to use the Bankruptcy Code, this Case, and this court to its advantage in order to pressure the Teknek Affiliates to satisfy the SDI Judgment including, *inter alia*,

conducting extensive Rule 2004 discovery of the Teknek Affiliates and seeking and obtaining orders of contempt from this court against the Teknek Affiliates. At the same time, SDI aggressively pursued collection of the SDI Judgment through post judgment proceedings in the California District Court including, *inter alia*, seeking to add certain former affiliates of the Debtor and Electronics to the SDI judgment on an alter-ego theory of liability, attempting to register the SDI Judgment against the Debtor and Electronics in Illinois and Scotland, and seeking post-judgment contempt orders in connection with its efforts to discover assets from which it could satisfy the SDI Judgment.

G. On May 9, 2007, after almost two years of enduring the pressure from SDI and Trustee, then acting for the benefit of SDI, certain of the Teknek Affiliates filed a motion to stay the proceedings before this court based on their purported intention to pay the SDI Judgment, in full, through a mediation scheduled before the California District Court.

H. It became apparent to the Trustee at that time that SDI intended to collect the alter-ego claims of the Debtor's estate (the "Estate") outside of these proceedings and without regard to the significant administrative expenses already incurred by the Estate for the benefit of SDI.

I. The Trustee immediately moved to employ his present counsel and initiated this proceeding to enjoin SDI from interfering with his collection of the Estate's

alter-ego claims against the Teknek Affiliates and certain other third parties (the "Injunction Action"). Freeborn & Peters has since withdrawn as counsel to the Trustee and SDI.

J. On August 7, 2007, in an apparent attempt to undermine this court's jurisdiction and the Trustee's ability to pursue and collect the Estate's alter-ego claims, SDI filed a Notice of Withdrawal of Claim purporting to withdraw the SDI Claim.

K. At the time of the attempted withdrawal, SDI was the subject of the pending Injunction Action, this court's Injunction and had otherwise significantly participated in the Bankruptcy Case such that it was required to seek leave of this court prior to withdrawing its claim. SDI failed to seek such relief and, thus, the Notice of Withdrawal of Claim is ineffective and a nullity. *See* Fed. R. Bankr, P. 3006.

L. The clear import of the ongoing proceedings in the California District Court is to avoid and subvert the Trustee's efforts in this court to proceed under Fed. R. Bankr. P. 9019 for approval of a settlement between the Trustee and certain of the persons and entities related to and affiliated with the debtor, including Sheila Hamilton, Jonathan Kennett, Teknek Holdings, Ltd. and Tekena USA, LLC. As such, the proceedings in the California District Court have a direct and adverse impact on property of this chapter 7 estate and the Trustee's administration and liquidation of that property in accordance with 11 U.S.C. § 704(a).

Based on the foregoing, it is ORDERED:

1. SDI's objections to the Motion are overruled.

2. The Motion is granted.

3. SDI's Notice of Withdrawal of Claim is null and void.

4. The ongoing proceedings in the California District Court, violate the automatic stay of proceedings now in force and effect pursuant to 11 U.S.C. § 362(a), as supplemented by this court's Injunction, a copy of which is annexed hereto and incorporated herein by this reference. *See Celotex v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493 (1995) (reversing the Fifth Circuit Court of Appeals and the Texas district court for entering orders in violation of a bankruptcy court's § 105(a) injunction prohibiting judgment creditors from collecting on the debtor's prepetition surety bond from a non-debtor surety); *Kalb v. Feuerstein*, 308 U.S. 433, 438-39, 60 S.Ct. 343, 84 L.Ed. 370 (1940); *Middle Tenn. News Co., Inc. v. Channel of Cincinnati, Inc.*, 250 F.3d 1077, 1082 (7th Cir. 2001) ("Actions taken in violation of an automatic stay ordinarily are void."); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *see also In re Excel Innovations, Inc.*, 2007 WL 2555941 at *4 (9th Cir. September 7, 2007) (equating § 362(a) stay with a § 105(a) injunction). *See also Bronson v. U.S.*, 46 F.3d 1573, 1576-82 (Fed. Cir. 1995) (acts in violation of automatic stay are voidable instead of void).

5. This court shall retain jurisdiction over SDI, together with its officers, attorneys and other agents, to take such additional action as may be necessary to enforce the automatic stay, as supplemented by this court's Injunction.

Dated: October 2, 2007

ENTER:

s/ Jacqueline P. Cox
United States Bankruptcy Judge

## APPENDIX F — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 13, 2009

**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

No. 05 B 27545

In re TEKNEK, LLC,

*Debtor.*

**MEMORANDUM OPINION**

JACQUELINE P. COX, Bankruptcy Judge.

In this proceeding, David Leibowitz, chapter 7 trustee of the debtor, Teknek, LLC ("Teknek"), moves for authority to compromise claims with Sheila Hamilton ("Hamilton"), Jonathon Kennett ("Kennett"), and Teknek Holdings, Ltd. ("Holdings"). The motion is opposed by Neal Levin ("Levin") of the law firm Freeborn & Peters LLP ("F & P"), former special counsel to the chapter 7 trustee and holder of an administrative claim. For the reasons set forth below, the motion is granted.

### I. JURISDICTION

The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for

the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), (C), (E), (H), and (O).

## II. BACKGROUND

On July 12, 2004, Systems Division, Inc. ("SDI") obtained a jury verdict in a patent infringement case in the Central District of California against Teknek, along with a non-debtor affiliate, Teknek Electronics Ltd. ("Electronics"), and a judgement of $3,771,555.25 was subsequently entered against both defendants. At the time, Teknek was owned by Hamilton and Kennett, both of whom are citizens of Scotland. Electronics was owned by another non-debtor affiliate company, Holdings. All of the shares of Holdings were owned by Hamilton and Kennett. As a result of the judgment, Electronics initiated insolvency proceedings in Scotland. Teknek filed for chapter 7 bankruptcy protection in this Court on July 12, 2005. Prior to filing, in the time period between 2003 and 2005, it is alleged that Teknek transferred all of its assets to Electronics, who then proceeded to transfer all of its assets to various affiliated companies. The alleged transfers raised the suspicions of SDI, who filed a motion under seal on June 15, 2005 in the California District Court to add Holdings, Hamilton, and Kennett as defendants in its efforts to collect its judgment on the theory that Holdings, Hamilton, and Kennett were alter egos of Teknek and bankrupted Teknek and Electronics by fraudulently transferring their assets to Holdings, precluding SDI from recovering its judgment. On January 5, 2007, the

California District Court granted the motion, making Hamilton, Kennett, and Holdings jointly and severally liable for SDI's judgment. After this motion was granted, SDI unsuccessfully attempted to register the judgement in Scotland. The Scottish court denied SDI's requested relief because it had doubts about whether the California District Court had personal jurisdiction over Holdings, Hamilton, and Kennett sufficient to enforce SDI's judgment. SDI sought to domesticate its judgment in the District Court for the Northern District of Illinois. This effort was unsuccessful because certain procedural requirements were not followed.

When Teknek filed its bankruptcy petition in July 2005, Lawrence Fisher ("Fisher") was appointed as the chapter 7 trustee. Teknek's petition listed only two creditors: SDI, for its judgment amount and associated costs; and Holdings, for an advance of approximately $10,000. SDI hired Levin and his law firm, F & P to represent its interest in the Teknek bankruptcy proceeding. On November 10, 2005, this Court approved Fisher's retention of F & P as special counsel to the trustee to investigate Teknek's pre-petition transfers of assets. Fisher retained F & P based upon the extensive discovery F & P had conducted during the course of its representation of SDI and its knowledge and familiarity with the case. On January 16, 2006, Fisher filed an adversary proceeding, now *Liebowitz v. Hamilton*, Case No. 06-AP-00412, against Tekena USA, LLC (a Teknek affiliate, "Tekena"), Hamilton, Kennett, and other Teknek-affiliated parties seeking to avoid fraudulent transfers made by Teknek to various Teknek

affiliates; to pierce the corporate veil of Teknek and to find Hamilton and Kennett personally liable for Teknek's obligations; and to recover a wrongful distribution made by Teknek to Hamilton prior to the Teknek bankruptcy. Fisher obtained the appointment of an equitable receiver to monitor the business and transactions of Tekena. Appointment of this receiver was affirmed by the District Court.[1]

In May 2006, Fisher resigned as chapter 7 trustee and was replaced by Phillip D. Levey ("Levy"). At that time, Hamilton and Kennett were attempting to settle SDI's judgment outside the bankruptcy after the entry of the California District Court's order finding Tekena, Hamiltion, and Kennett jointly and severally liable to SDI. Essentially, this meant that SDI and Levey were pursuing the same claim; as a result, Levey instructed his general counsel to sue SDI for interfering with the administration of the bankruptcy estate. F & P resigned as special counsel to the chapter 7 trustee due to the conflict of interest created by the action against SDI.

On June 22, 2007, Levey filed an adversary proceeding against SDI for injunctive and other relief, seeking an order enforcing the automatic stay against SDI interfering with the administration of the bankruptcy estate and an injunction barring SDI from further attempting to collect its judgment outside the bankruptcy. This Court entered a preliminary injunction

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1. *See Tekena USA, LLC v. Fisher*, 2006 WL 2536631 (N.D.Ill.2006).

after conducting a hearing on June 20, 2007 enjoining SDI from pursuing collection of its judgment that was effective until July 27, 2007. The injunction was subsequently extended to August 28, 2007. SDI appealed the injunction and the District Court vacated the injunction on February 5, 2008. The trustee subsequently appealed the District Court decision; the matter is currently on appeal before the United States Court of Appeals for the Seventh Circuit. On February 29, 2008, SDI entered into a settlement agreement in the Central District of California with Hamilton, Kennett, and Holdings resolving all litigation between the parties. SDI states that it is no longer interested in pursuing its claim. However, Levey maintained that, as chapter 7 trustee, he had the exclusive right to pursue alter ego and piercing the corporate veil claims to collect SDI's judgment and to satisfy the estate's claims consisting of SDI's claim and administrative claims incurred in the administration of the estate that chiefly benefitted SDI. The Court has denied SDI's motions to withdraw its claim.[2]

In April 2008, Levey sought to re-employ Levin and F & P as special counsel to the trustee for the limited purpose of representing him in the action against the Teknek-affiliated parties. While the application was

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2. *See* Order on Trustee's Motion to Clarify and Enforce this Court's June 29, 2007 Preliminary Injunction Order, Case No. 07-AP-00583 [Dkt. No. 123], Oct. 2, 2007; Order on Motion to Withdraw Claim, Case No. 05-B-27545 [Dkt. No. 268], May 13, 2008; *See also In re Teknek*, 394 B.R. 884, 889 (Bankr.N.D. Ill.2008).

pending, Levey resigned as chapter 7 trustee and was replaced by David P. Leibowitz ("Trustee") who maintained the application to employ F & P as special counsel to the chapter 7 trustee. The application was denied by this Court on October 20, 2008 due to the conflict of interest due to F & P's prior representation of SDI in the bankruptcy case.[3] F & P currently has an allowed administrative claim in the amount of $520,390.05. There are also other administrative claims.

The Trustee and the Teknek-affiliated defendants now wish to settle all claims between them for $350,000.00. F & P objects, arguing that the settlement is insufficient considering that a potential recovery from the defendants for over $4 million is possible.

## III. DISCUSSION

At issue is whether the Trustee's proposed settlement agreement should be granted. "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr.P. 9019(a). Settlements are generally favored since they allow the bankruptcy estate to avoid costs and using resources to litigate contested claims. *In re Del Grosso*, 106 B.R. 165, 167 (Bankr.N.D.Ill.1989). However, a bankruptcy court must exercise its own judgement in evaluating a proposed settlement and not simply "rubber-stamp" the trustee's proposal. *In re Am. Reserve Corp.*, 841 F.2d 159, 162 (7th Cir.1987).

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3. *See In re Teknek, LLC*, 394 B.R. 884 (Bankr.N.D.Ill.2008).

*Appendix F*

In evaluating adversary proceeding litigation settlements, courts employ the "best interests of the estate test" meaning that a bankruptcy court will approve only those agreements that are in the best interests of the bankruptcy estate. *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir.2007). To make this determination, the court "is required to apprise [itself] 'of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.' " *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir.1994) (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968)). To determine the best interests of the estate, a comparison looking at the costs and probable benefits of continuing the litigation are weighed against the value of the settlement. *Doctors Hosp.*, 474 F.3d 421. Factors used in this comparison include "the litigation's probability of success, complexity, expense, inconvenience, and delay, 'including the possibility that disapproving the settlement will cause wasting of assets.' " *Id.* (quoting *Am. Reserve*, 841 F.2d at 161). The settlement's value must be the reasonable equivalent of the surrendered claims. *Id.* This standard is met where the settlement's value falls within a range of possible litigation outcomes. *Id.* If the value of the settlement falls below this range, the settlement will fail the reasonable equivalent standard. *Id.* The court is not required to conduct a full evidentiary hearing before a compromise can be approved. *Depoister*, 36 F.3d at 586.

*Appendix F*

To support his application, the Trustee notes the inherent difficulties involved in this case. The Trustee concedes that likelihood of success on the merits is high, but points to potential roadblocks. Even though the likelihood of success on the merits is high, the Trustee notes the additional time and expense that may be incurred by further litigating with the Teknek-affiliated defendants. Further, if a favorable judgment is obtained, the Trustee still believes collecting on that judgement in Scotland may be an issue, noting that SDI was unable to collect its judgment before a Scottish court because that court questioned the California District Court's personal jurisdiction over the defendants. Moreover, the settlement leaves SDI's settlement untouched, meaning there remains no reason to pursue a claim on SDI's behalf as it is satisfied by the settlement between SDI and Teknek even though the SDI settlement proceeded in violation of the automatic stay.

F & P objects to the settlement, arguing that the settlement does not represent the best interests of the estate. F & P urges that costs in maintaining the adversary proceeding against the Teknek-affiliated defendants would be low compared to a potentially high award of seven figures for a favorable outcome for the estate. According to F & P, substantial discovery has been completed in this matter and the evidence obtained so far supports the assertion that a large recovery is likely. Notably, F & P points to the affidavit of Mark Rollinson, a Tekena employee and one of the defendants in the adversary proceeding against the Teknek-affiliated parties. The affidavit details how Rollinson was

involved in moving Teknek's assets to different Teknek entities. Thus, F & P's position is that there is a potentially large recovery for little additional effort by the estate, that the settlement agreement does not accurately reflect.

Even if the likelihood of success on the merits is high, the settlement agreement is reasonable and in the best interests of the estate. In this case, the claim of SDI, the only non-administrative creditor, has already been satisfied by a settlement agreement, even though it was procured by efforts outside this Court's jurisdiction. That leaves SDI's claim largely satisfied and only administrative claims left to be paid. Proceeding in continued litigation would definitely increase costs to the estate. There is also the consideration of future litigation involving the Teknek-affiliated defendants culminating in a possible trial. Additionally, it is foreseeable that SDI would again enter the litigation to protect its settlement. These factors surely would increase costs and use of the estate's resources. The only claims left to be satisfied are administrative, those of the attorneys representing the Trustee. Future litigation would increase these claims substantially.[4] Therefore, settling this matter under the offered terms is in the best interests of the estate.

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4. The Court notes that F & P's claim would likely remain at its current level since it was disqualified from further representing the Trustee in this matter.

*Appendix F*

## IV. CONCLUSION

For the reasons stated above, the Trustee's motion for authority to compromise claims with Hamilton, Kennett, and Holdings is GRANTED.

The above memorandum opinion is to serve as findings of fact and conclusions of law pursuant to Federal Rule Civil Procedure 52, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7052.

**APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 28, 2009**

**UNITED STATES COURT OF APPEALS**
**For the Seventh Circuit**
Chicago, Illinois 60604

May 28, 2009

*Before*

WILLIAM J. BAUER, *Circuit Judge*

RICHARD D. CUDAHY, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-1137

IN RE: TEKNEK, LLC, *Debtor*

DAVID P. LIEBOWITZ, TRUSTEE
*Plaintiff-Appellant,*

*v.*

SYSTEMS DIVISION, INC.,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 07-C-5229

Rebecca R. Pallmeyer, *Judge*

*Appendix G*

## ORDER

On consideration of the petition of Plaintiff-Appellant for rehearing with suggestion for rehearing *en banc* filed May 13, 2009, by David P. Liebowitz, Trustee, in the above-captioned case, all of the judges on the original panel have voted to deny rehearing and none of the active judges on the court have voted for a rehearing en banc.

Therefore, the petition for rehearing is DENIED.